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of the cause, or in the rights of the parties. It would seem reasonable, therefore, that the suit should proceed, and not be dismissed or abated. In the absence of all authority which binds the Court to a different course, we are disposed to adopt this doctrine, and shall promulgate a general rule on the subject.

Rule accordingly.

(CONSTITUTIONAL LAW.)

COHENS V. VIRGINIA.

THIS Court has, constitutionally, appellate jurisdiction under the judiciary act of 1789, c. 20. s. 25. from the final judgment or decree of the highest Court of law or equity of a State, having jurisdiction of the subject matter of the suit, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such, their validity; or of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed, by either party. under such clause of the constitution, treaty, statute, or commission.

It is no objection to the exercise of this appellate jurisdiction, that one of the parties is a State, and the other a citizen of that State.

a Vide new order of Court of the present term. Ante, Rule XXXII.

The act of Congress of the 4th of May, 1812, entitled, "an act further to amend the charter of the city of Washington," which provides, (s. 6.) that the Corporation of the city shall be empowered, for certain purposes, and under certain restrictions, to authorize the drawing of lotteries, does not extend to authorize the Corporation to force the sale of the tickets in such lottery, in States where such sale may be prohibited by the State laws.

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THIS was a writ of error to the Quarterly Session Court for the borough of Norfolk, in the State of Virginia, under the 25th section of the judiciary act of 1789, c. 20. it being the highest Court of law or equity of that State having jurisdiction of the case.

Pleas at the Court House of Norfolk borough, before the Mayor, Recorder, and Aldermen of the said borough, on Saturday, the second day of September, one thousand eight hundred and twenty, and in the forty-fifth year of the Commonwealth.

Be it remembered, that heretofore, to wit : At a Quarterly Session Court, held the twenty-sixth day of June, one thousand eight hundred and twenty, the grand jury, duly summoned and impanelled for the said borough of Norfolk, and sworn and charged according to law, made a presentment in these words :

We present P. J. and M. J. Cohen, for vending and selling two halves and four quarter lottery tickets of the National Lottery, to be drawn at Washington, to William H. Jennings, at their office at the corner of Maxwell's wharf, contrary to the act thus made and provided in that case, since January, 1820. On the information of William H. Jennings.

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Whereupon the regular process of law was awarded against the said defendants, to answer the said presentment, returnable to the next succeeding term, which was duly returned by the Sergeant of the borough of Norfolk—"Executed."

And at another Quarterly Session Court, held for the said borough of Norfolk, the twenty-ninth day of August, one thousand eight hundred and twenty, came, as well the attorney prosecuting for the Commonwealth, in this Court, as the defendants, by their attorney, and on the motion of the said attorney, leave is given by the Court to file an information against the defendants on the presentment aforesaid, which was accordingly filed, and is in these words :

Information.

Norfolk borough, to wit Be it remembered, that James Nimmo, attorney for the Commonwealth of Virginia, in the Court of the said borough of Norfolk, cometh into Court, in his proper person, and with leave of the Court, giveth the said Court to understand and be informed, that by an act of the General Assembly of the said Commonwealth of Virginia, entitled, "An act to reduce into one, the several acts, and parts of acts, to prevent unlawful gaming," It is, among other things, enacted and declared, that no person or persons shall buy, or sell, within the said Commonwealth, any lottery, or part or share of a lottery ticket, except in such lottery or lotteries as may be authorized by the laws thereof: and the said James Nimmo, as attorney aforesaid, further giveth the Court to understand and be informed, that P. J. and M. J. Cohen, traders and partners, late of the parish of Elizabeth River, and


borough of Norfolk aforesaid, being evil disposed persons, and totàlly regardless of the laws and statutes of the said Commonwealth, since the first day of January, in the year of our Lord one thousand eight hundred and twenty, that is to say, on the first day of June, in that year, and within the said Commonwealth of Virginia, to wit, at the parish of Elizabeth River, in the said borough of Norfolk, and within the jurisdiction of this Court, did then and there unlawfully vend, sell, and deliver to a certain William H. Jennings, two half lottery tickets, and four quarter lottery tickets, of the National Lottery, to be drawn in the City of Washington, that being a lottery not authorized by the laws of this Commonwealth, to the evil example of all other persons, in the like case offending, and against the form of the act of the General Assembly, in that case made and provided.

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JAMES NIMMO, *for the Commonwealth.*

And at this same Quarterly Session Court, continued by adjournment, and held for the said borough of Norfolk, the second day of September, eighteen hundred and twenty, came, as well the attorney prosecuting for the Commonwealth, in this Court, as the defendants, by their attorney, and the said defendants, for plea, say, that they are not guilty in manner and form, as in the information against them is alleged, and of this they put themselves upon the country. and the attorney for the Commonwealth doth the same; whereupon a case

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was agreed by them to be argued in lieu of a special verdict, and is in these words ·

Commonwealth against Cohens—case agreed.

Case agreed.

In this case, the following statement is admitted and agreed by the parties in lieu of a special verdict : that the defendants, on the first day of June, in the year of our Lord eighteen hundred and twenty, within the borough of Norfolk, in the Commonwealth of Virginia, sold to William H. Jennings a lottery ticket, in the lottery called, and denominated, the National Lottery, to be drawn in the City of Washington, within the District of Columbia.

That the General Assembly of the State of Virginia enacted a statute, or act of Assembly, which went into operation on the first day of January, in the year of our Lord 1820, and which is still unrepealed, in the words following

Prohibition of
 Lotteries, &c.

No person, in order to raise money for himself or another, shall, publicly or privately, put up a lottery to be drawn or adventured for, or any prize or thing to be raffled or played for · And whosoever shall offend herein, shall forfeit the whole sum of money proposed to be raised by such lottery, raffling or playing, to be recovered by action of debt, in the name of any one who shall sue for the same, or by indictment or information in the name of the commonwealth, in either case, for the use and benefit of the literary fund. Nor shall any person or persons buy, or sell, within this Commonwealth, any lottery ticket, or part or share of a lottery ticket, except in such lottery or lotteries as may be authorized by the laws

thereof, and any person or persons offending herein, shall forfeit and pay, for every such offence, the sum of one hundred dollars, to be recovered and appropriated in manner last aforesaid.

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That the Congress of the United States enacted a statute on the third day of May, in the year of our Lord 1802, entitled, An Act, &c. in the words and figures following :

*An Act to incorporate the inhabitants of the City of Washington, in the District of Columbia.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the inhabitants of the City of Washington be constituted a body politic and corporate, by the name of a Mayor and Council of the City of Washington, and by their corporate name, may sue and be sued, implead and be impleaded, grant, receive, and do all other acts as natural persons, and may purchase and hold real, personal and mixed property, or dispose of the same for the benefit of the said city, and may have and use a city seal, which may be altered at pleasure. The City of Washington shall be divided into three divisions or wards, as now divided by the Levy Court for the county, for the purposes of assessment, but the number may be increased hereafter, as in the wisdom of the City Council shall seem most conducive to the general interest and convenience.

Washington in-  
corporated.

Sec. 2. And be it further enacted, That the Council of the City of Washington shall consist of twelve

City Council—  
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members, residents of the city, and upwards of twenty-five years of age, to be divided into two chambers, the first chamber to consist of seven members, and the second chamber of five members, the second chamber to be chosen from the whole number of councillors, elected by their joint ballot. The City Council to be elected annually by ballot, in a general ticket, by the free white male inhabitants of full age, who have resided twelve months in the city, and paid taxes therein the year preceding the elections being held the justices of the county of Washington, resident in the city, or any three of them, to preside as judges of election, with such associates as the council may from time to time appoint.

Elections when  
held.

Sec. 3. And be it further enacted, That the first election of members of the City Council, shall be held on the first Monday in June next, and in every year afterwards, at such place in each ward as the judges of the election may prescribe.

Mode of con-  
ducting it.

Sec. 4. And be it further enacted, That the polls shall be kept open from eight o'clock in the morning, till seven o'clock in the evening, and no longer, for the reception of ballots. On the closing of the poll, the judges shall close and seal their ballot boxes, and meet on the day following, in the presence of the Marshal of the District, on the first election, and the council afterwards, when the seals shall be broken, and the votes counted within three days after such election, they shall give notice to the persons having the greatest number of legal votes, that they are duly elected, and shall make their return to the Mayor of the city.

Sec. 5. And be it further enacted, That the Mayor of the city shall be appointed annually by the President of the United States; he must be a citizen of the United States, and a resident of the city prior to his appointment.

Sec. 6. And be it further enacted, That the City Council shall hold their sessions in the City Hall, or until such building is erected, in such place as the Mayor may provide for that purpose, on the second Monday in June, in each year, but the Mayor may convene them oftener, if the public good require their deliberations; three fourths of the members of each Council, may be a quorum to do business, but a smaller number may adjourn from day to day. they may compel the attendance of absent members in such manner, and under such penalties, as they may, by ordinance, provide they shall appoint their respective Presidents, who shall preside during their sessions, and shall vote on all questions where there is an equal division. they shall settle their rules of proceedings, appoint their own officers, regulate their respective fees, and remove them at pleasure. they shall judge of the elections, returns, and qualifications of their own members, and may, with the concurrence of three-fourths of the whole, expel any member for disorderly behaviour, or malconduct in office, but not a second time for the same offence: they shall keep a journal of their proceedings, and enter the yeas and nays on any question, resolve or ordinance, at the request of any member, and their deliberations shall be public. The Mayor shall appoint to all offices under the Corporation. All ordi-


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Mayor of the  
City; when ap-  
pointed, &c.City Council, its  
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nances or acts passed by the City Council, shall be sent to the Mayor for his approbation, and when approved by him, shall then be obligatory as such. But, if the said Mayor shall not approve of such ordinance or act, he shall return the same within five days, with his reasons in writing therefor, and if three-fourths of both branches of the City Council, on reconsideration thereof, approve of the same, it shall be in force in like manner as if he had approved it, unless the City Council, by their adjournment, prevent its return.

Powers of the  
Corporation  
prescribed.

Sec. 7. And be it further enacted, 'That the Corporation aforesaid shall have full power and authority to pass all by-laws and ordinances to prevent and remove nuisances, to prevent the introduction of contagious diseases within the City, to establish night watches or patrols, and erect lamps, to regulate the stationing, anchorage, and mooring of vessels, to provide for licensing and regulating auctions, retailers of liquors, hackney carriages, waggons, carts and drays, and pawn-brokers within the city, to restrain or prohibit gambling, and to provide for licensing, regulating, or restraining theatrical or other public amusements within the City, to regulate and establish markets, to erect and repair bridges, to keep in repair all necessary streets, avenues, drains and sewers, and to pass regulations necessary for the preservation of the same, agreeably to the plan of the said City; to provide for the safe keeping of the standard of weights and measures fixed by Congress, and for the regulation of all weights and measures used in the City; to provide

for the licensing and regulating the sweeping of chimneys, and fixing the rates thereof, to establish and regulate fire wards and fire companies, to regulate and establish the size of bricks that are to be made and used in the City; to sink wells, and erect and repair pumps in the streets, to impose and appropriate fines, penalties and forfeitures for breach of their ordinances; to lay and collect taxes, to enact by-laws for the prevention and extinguishment of fires; and to pass all ordinances necessary to give effect and operation to all the powers vested in the Corporation of the City of Washington: Provided, That the by-laws, or ordinances of the said Corporation, shall be in no wise obligatory upon the persons of non-residents of the said City, unless in cases of intentional violation of the by-laws or ordinances previously promulgated. All the fines, penalties and forfeitures imposed by the Corporation of the City of Washington, if not exceeding twenty dollars, shall be recovered before a single magistrate, as small debts are by law recoverable; and if such fines, penalties and forfeitures, exceed the sum of twenty dollars, the same shall be recovered by action of debt, in the District Court of Columbia, for the County of Washington, in the name of the Corporation, and for the use of the City of Washington.


Sec. 8. And be it further enacted, That the person or persons appointed to collect any tax imposed in virtue of the powers granted by this Act, shall have authority to collect the same, by distress and sale of the goods and chattels of the person chargeable therewith; no sale shall be made, unless ten days

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Taxes how collected.

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previous notice thereof be given. no law shall be passed by the City Council subjecting vacant or unimproved city lots, or parts of lots, to be sold for taxes.

Council to provide
 for the
 poor, &c.

Sec. 9. And be it further enacted, That the City Council shall provide for the support of the poor, infirm and diseased of the City.

Rate of tax.

Sec. 10. Provided always, and be it further enacted, That no tax shall be imposed by the City Council on real property in the said City, at any higher rate than three quarters of one per centum, on the assessment valuation of such property.

Sec. 11. And be it further enacted, That this Act shall be in force for two years from the passing thereof, and from thence to the end of the next session of Congress thereafter, and no longer.

And another act, on the 23d day of February, 1804, entitled "An Act supplementary to an Act, entitled, an Act to incorporate the inhabitants of the City of Washington, in the District of Columbia."

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the Act, entitled, an Act to incorporate the inhabitants of the City of Washington, in the District of Columbia, except so much of the same as is consistent with the provisions of this Act, be, and the same is hereby continued in force, for and during the term of fifteen years from the end of the next session of Congress.

Sec. 2. And be it further enacted, That the Council of the City of Washington, from and after the

period for which the members of the present Council have been elected, shall consist of two chambers, each of which shall be composed of nine members, to be chosen by distinct ballots, according to the directions of the Act to which this is a supplement, a majority of each chamber shall constitute a quorum to do business. In case vacancies shall occur in the Council, the chamber in which the same may happen, shall supply the same by an election by ballot, from the three persons next highest on the list to those elected at the preceding election, and a majority of the whole number of the chamber in which such vacancy may happen, shall be necessary to make an election.

Sec. 3. And be it further enacted, That the Council shall have power to establish and regulate the inspection of flour, tobacco, and salted provisions, the gauging of casks and liquors, the storage of gunpowder, and all naval and military stores, not the property of the United States, to regulate the weight and quality of bread, to tax and license hawkers and peddlers, to restrain or prohibit tippling houses, lotteries, and all kinds of gaming, to superintend the health of the City, to preserve the navigation of the Potomac and Anacostia rivers adjoining the City, to erect, repair, and regulate public wharves, and to deepen docks and basins, to provide for the establishment and superintendence of public schools, to license and regulate, exclusively, hackney coaches, ordinary keepers, retailers and ferries, to provide for the appointment of inspectors, constables, and such other officers as may be necessary to execute the

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laws of the Corporation, and to give such compensation to the Mayor of the City as they may deem fit.

Sec. 4. And be it further enacted, That the Levy Court of the county of Washington shall not hereafter possess the power of imposing any tax on the inhabitants of the City of Washington."

That the Congress of the United States, on the 4th day of May, in the year of our Lord 1812, enacted another statute, entitled, An Act further to amend the Charter of the City of Washington.

Corporation of  
 the City, how  
 composed.

" Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That from and after the first Monday in June next, the Corporation of the City of Washington shall be composed of a Mayor, a Board of Aldermen, and a Board of Common Council, to be elected by ballot, as hereafter directed, the Board of Aldermen shall consist of eight members, to be elected for two years, two to be residents of, and chosen from, each ward, by the qualified voters therein, and the Board of Common Council shall consist of twelve members, to be elected for one year, three to be residents of, and chosen from, each ward, in manner aforesaid: and each board shall meet at the Council Chamber on the second Monday in June next, (for the despatch of business,) at ten o'clock in the morning, and on the same day, and at the same hour, annually, thereafter. A majority of each board shall be necessary to form a quorum to do business, but a less number may adjourn from day to day. The Board of Aldermen, immediately after they shall

have assembled in consequence of the first election, shall divide themselves by lot into two classes; the seats of the first class shall be vacated at the expiration of one year, and the seats of the second class shall be vacated at the expiration of two years, so that one half may be chosen every year. Each board shall appoint its own President from among its own members, who shall preside during the sessions of the board, and shall have a casting vote on all questions where there is an equal division; provided such equality shall not have been occasioned by his previous vote.

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Proviso.

Sec. 2. And be it further enacted, That no person shall be eligible to a seat in the Board of Aldermen or Board of Common Council, unless he shall be more than twenty-five years of age, a free white male citizen of the United States, and shall have been a resident of the City of Washington one whole year next preceding the day of the election; and shall, at the time of his election, be a resident of the ward for which he shall be elected, and possessed of a freehold estate in the said City of Washington, and shall have been assessed two months preceding the day of election. And every free white male citizen of lawful age, who shall have resided in the City of Washington for the space of one year next preceding the day of election, and shall be a resident of the ward in which he shall offer to vote, and who shall have been assessed on the books of the Corporation, not less than two months prior to the day of election, shall be qualified to vote for members to serve in the said Board of Aldermen and Board of Common

Qualifications  
of the elected.,

And electors.

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Present Mayor  
to be continued  
in office, &c.

Council, and no other person whatever shall exercise the right of suffrage at such election.

Sec. 3. And be it further enacted, That the present Mayor of the City of Washington shall be, and continue such, until the second Monday in June next, on which day, and on the second Monday in June annually thereafter, the Mayor of the said City shall be elected by ballot of the Board of Aldermen and Board of Common Council, in joint meeting, and a majority of the votes of all the members of both boards shall be necessary to a choice, and if there should be an equality of votes between two persons after the third ballot, the two houses shall determine by lot. He shall, before he enters upon the duties of his office, take an oath or affirmation in the presence of both boards, "lawfully to execute the duties of his office to the best of his skill and judgment, without favour or partiality." He shall, *ex officio*, have, and exercise all the powers, authority, and jurisdiction of a Justice of the Peace, for the County of Washington, within the said county. He shall nominate, and with the consent of a majority of the members of the Board of Aldermen, appoint to all offices under the Corporation, (except the commissioners of elections,) and every such officer shall be removed from office on the concurrent remonstrance of a majority of the two boards. He shall see that the laws of the Corporation be duly executed, and shall report the negligence or misconduct of any officer to the two boards. He shall appoint proper persons to fill up all vacancies during the recess of the Board of Aldermen, to hold such

His duties, &amp;c.

appointment until the end of the then ensuing session. He shall have power to convene the two Boards, when, in his opinion, the good of the community may require it, and he shall lay before them, from time to time, in writing, such alterations in the laws of the Corporation as he shall deem necessary and proper, and shall receive for his services annually, a just and reasonable compensation, to be allowed and fixed by the two boards, which shall neither be increased or diminished during the period for which he shall have been elected. Any person shall be eligible to the office of Mayor, who is a free white male citizen of the United States, who shall have attained to the age of thirty years, and who shall be a *bona fide* owner of a freehold estate in the said City, and shall have been a resident in the said City two years immediately preceding his election, and no other person shall be eligible to the said office. In case of the refusal of any person to accept the office of Mayor, upon his election thereto, or of his death, resignation, inability or removal from the City, the said two boards shall elect another in his place, to serve the remainder of the year.

Sec. 4. And be it further enacted, That the first election for members of the Board of Aldermen, and Board of Common Council, shall be held on the first Monday in June next, and on the first Monday in June annually thereafter. The first election to be held by three commissioners to be appointed in each ward by the Mayor of the City, and at such place in each ward as he may direct; and all subsequent elections shall be held by a like number

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of Commissioners, to be appointed in each ward by the two boards, in joint meeting, which several appointments, except the first, shall be at least ten days previous to the day of each election. And it shall be the duty of the Mayor for the first election, and of the commissioners for all subsequent elections, to give at least five days public notice of the place in each ward where such elections are to be held. The said commissioners shall, before they receive any ballot, severally take the following oath or affirmation, to be administered by the Mayor of the City, or any Justice of the Peace for the county of Washington: "I, A. B. do solemnly swear or affirm, (as the case may be) that I will truly and faithfully receive, and return the votes of such persons as are by law entitled to vote for members of the Board of Aldermen, and Board of Common Council, in ward No.—, according to the best of my judgment and understanding, and that I will not, knowingly, receive or return the vote of any person who is not legally entitled to the same, so help me God." The polls shall be opened at ten o'clock in the morning, and be closed at seven o'clock in the evening, of the same day. Immediately on closing the polls, the commissioners of each ward, or a majority of them, shall count the ballots, and make out under their hands and seals a correct return of the two persons for the first election, and of the one person for all subsequent elections, having the greatest number of legal votes, together with the number of votes given to each, as members of the Board of Aldermen and of the three persons having the greatest number of legal

votes, together with the number of votes given to each, as Members of the Board of Common Council. And the two persons at the first election, and the one person at all subsequent elections, having the greatest number of legal votes for the Board of Aldermen, and the three persons having the greatest number of legal votes for the Board of Common Council, shall be duly elected, and in all cases of an equality of votes, the commissioners shall decide by lot. The said returns shall be delivered to the Mayor of the City, on the succeeding day, who shall cause the same to be published in some news-paper printed in the city of Washington. A duplicate return, together with a list of the persons who voted at such election, shall also be made by the said commissioners, to the Register of the City, on the day succeeding the election, who shall preserve and record the same, and shall, within two days thereafter, notify the several persons so returned, of their election; and each board shall judge of the legality of the elections, returns and qualifications of its own members, and shall supply vacancies in its own body, by causing elections to be made to fill the same, in the ward, and for the Board in which such vacancies shall happen; giving at least five days notice previous thereto; and each Board shall have full power to pass all rules necessary and requisite to enable itself to come to a just decision in cases of a contested election of its own members and the several members of each Board shall, before entering upon the duties of their office, take the following oath or af-

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firmation "I do swear, (or solemnly, sincerely, and truly affirm and declare, as the case may be,) that I will faithfully execute the office of \_\_\_\_\_ to the best of my knowledge and ability," which oath or affirmation shall be administered by the Mayor, or some Justice of the Peace, for the county of Washington.

Sec. 5. And be it further enacted, That in addition to the powers heretofore granted to the Corporation of the City of Washington, by an act, entitled, "An Act to incorporate the inhabitants of the City of Washington, in the District of Columbia," and an act. entitled, "An Act, supplementary to an act, entitled, an act to incorporate the inhabitants of the City of Washington, in the District of Columbia," the said Corporation shall have power to lay taxes on particular wards, parts, or sections of the City, for their particular local improvements.

Apportionment  
 of taxes and ex-  
 penditures.

That after providing for all objects of a general nature, the taxes raised on the assessible property in each ward, shall be expended therein, and in no other, in regulating, filling up and repairing of streets and avenues, building of bridges, sinking of wells, erecting pumps, and keeping them in repair, in conveying water in pumps, and in the preservation of springs, in erecting and repairing wharves, in providing fire engines and other apparatus for the extinction of fires, and for other local improvements and purposes, in such manner as the said Board of Aldermen and Board of Common Council shall provide, but the sums raised for the support of the poor.

Support of the  
 poor to be a ge-  
 neral charge.

aged and infirm, shall be a charge on each ward in proportion to its population or taxation, as the two Boards shall decide. That whenever the proprietors of two thirds of the inhabited houses, fronting on both sides of a street, or part of a street, shall by petition to the two branches, express the desire of improving the same, by laying the kurbstone of the foot pavement, and paving the gutters or carriage way thereof, or otherwise improving said street, agreeably to its graduation, the said Corporation shall have power to cause to be done at any expense, not exceeding two dollars and fifty cents per front foot, of the lots fronting on such improved street or part of a street, and charge the same to the owners of the lots fronting on said street, or part of a street, in due proportion, and also on a like petition to provide for erecting lamps for lighting any street or part of a street, and to defray the expense thereof by a tax on the proprietors or inhabitants of such houses, in proportion to their rental or valuation, as the two Boards shall decide.

Sec. 6. And be it further enacted, That the said Corporation shall have full power and authority to erect and establish hospitals or pest houses, work houses, houses of correction, penitentiary, and other public buildings for the use of the City, and to lay and collect taxes for the defraying the expenses thereof, to regulate party and other fences, and to determine by whom the same shall be made and kept in repair, to lay open streets, avenues, lanes and alleys, and to regulate or prohibit all inclosures thereof, and to occupy and improve for public purposes, by

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and with the consent of the President of the United States, any part of the public and open spaces or squares in said city, not interfering with any private rights, to regulate the measurement of, and weight, by which all articles brought into the city for sale shall be disposed of, to provide for the appointment of appraisers, and measurers of builders' work and materials, and also of wood, coal, grain and lumber, to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes and mulattoes, and to punish such slaves by whipping, not exceeding forty stripes, or by imprisonment not exceeding six calendar months, for any one offence, and to punish such free negroes and mulattoes for such offences, by fixed penalties, not exceeding twenty dollars for any one offence, and in case of inability of any such free negro or mulatto to pay and satisfy any such penalty and costs thereon, to cause such free negro or mulatto to be confined to labour for such reasonable time, not exceeding six calendar months, for any one offence, as may be deemed equivalent to such penalty and costs, to cause all vagrants, idle or disorderly persons, all persons of evil life or ill fame, and all such as have no visible means of support, or are likely to become chargeable to the City as paupers, or are found begging or drunk in or about the streets, or loitering in or about tippling houses, or who can show no reasonable cause of business or employment in the City, and all suspicious persons, and all who have no fixed place of residence, or cannot give a good account of themselves, all eves-droppers and night walkers, all who


are guilty of open profanity, or grossly indecent language or behaviour publicly in the streets, all public prostitutes, and such as lead a notoriously lewd or lascivious course of life, and all such as keep public gaming tables, or gaming houses, to give security for their good behaviour for a reasonable time, and to indemnify the City against any charge for their support, and in case of their refusal or inability to give such security, to cause them to be confined to labour for a limited time, not exceeding one year at a time, unless such security should be sooner given. But if they shall afterwards be found again offending, such security may be again required, and for want thereof, the like proceedings may again be had, from time to time, as often as may be necessary, to prescribe the terms and conditions upon which free negroes and mulattoes, and others who can show no visible means of support, may reside in the City, to cause the avenues, streets, lanes and alleys to be kept clean, and to appoint officers for that purpose. To authorize the drawing of lotteries for effecting any important improvement in the City; which the ordinary funds or revenue thereof will not accomplish. Provided, That the amount to be raised in each year, shall not exceed the sum of ten thousand dollars. And provided also, that the object for which the money is intended to be raised, shall be first submitted to the President of the United States, and shall be approved of by him. To take care of, preserve and regulate the several burying grounds within the City, to provide for registering of births, deaths and marriages, to cause abstracts or minutes

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To authorize  
Lotteries, &c.

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of all transfers of real property, both freehold and leasehold, to be lodged in the Registry of the City, at stated periods, to authorize night watches and patrols, and the taking up and confining by them, in the night time, of all suspected persons, to punish by law corporally any servant or slave guilty of a breach of any of their by-laws or ordinances, unless the owner or holder of such servant or slave, shall pay the fine annexed to the offence, and to pass all laws which shall be deemed necessary and proper for carrying into execution the foregoing powers, and all other powers vested in the Corporation, or any of its officers, either by this act, or any former act.

Sec. 7 And be it further enacted, That the Marshal of the District of Columbia shall receive, and safely keep, within the jail for Washington county, at the expense of the City, all persons committed thereto under the sixth section of this act, until other arrangements be made by the Corporation for the confinement of offenders, within the provisions of the said section, and in all cases where suit shall be brought before a Justice of the Peace, for the recovery of any fine or penalty arising or incurred for a breach of any by-law or ordinance of the Corporation, upon a return of "*nulla bona*" to any *fi. fa.* issued against the property of the defendant or defendants, it shall be the duty of the Clerk of the Circuit Court for the County of Washington, when required, to issue a writ of *capias ad satisfaciendum* against every such defendant, returnable to the next Circuit Court for the County of Washington there-

Remedy in case  
 of a return of  
*nulla bona*, &c.

after, and which shall be proceeded on as in other writs of the like kind.

Sec. 8. And be it further enacted, That unimproved lots in the City of Washington, on which two years taxes remain due and unpaid, or so much thereof as may be necessary to pay such taxes, may be sold at public sale for such taxes due thereon.

Provided, that public notice be given of the time and place of sale, by advertising in some newspaper printed in the City of Washington, at least six months, where the property belongs to persons residing out of the United States, three months where the property belongs to persons residing in the United States, but without the limits of the District of Columbia, and six weeks where the property belongs to persons residing within the District of Columbia or City of Washington, in which notice shall be stated the number of the lot or lots, the number of the square or squares, the name of the person or persons to whom the same may have been assessed, and also the amount of taxes due thereon. And provided, also, that the purchaser shall not be obliged to pay at the time of such sale, more than the taxes due, and the expenses of sale, and that, if within two years from the day of such sale, the proprietor or proprietors of such lot or lots, or his or their heirs, representatives, or agents, shall repay to such purchaser the moneys paid for the taxes and expenses as aforesaid, together with ten per centum per annum as interest thereon, or make a tender of the same, he shall be reinstated in his original right and title, but if no such payment or tender be made

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within two years next after the said sale, then the purchaser shall pay the balance of the purchase money of such lot or lots into the City Treasury, where it shall remain subject to the order of the original proprietor or proprietors, his or their heirs, or legal representatives, and the purchaser shall receive a title in fee simple to the said lot or lots, under the hand of the Mayor, and seal of the Corporation, which shall be deemed good and valid in law and equity

Style of the
 Corporation.

Sec. 9. And be it further enacted, That the said Corporation shall, in future, be named and styled, "The Mayor, Aldermen, and Common Council of the City of Washington;" and that if there shall have been a non-election or informality of a City Council, on the first Monday in June last, it shall not be taken, construed, or adjudged, in any manner, to have operated as a dissolution of the said Corporation, or to affect any of its rights, privileges, or laws passed previous to the second Monday in June last, but the same are hereby declared to exist in full force.

Corporation to
 cause wards to
 be located with
 a view to elec-
 tion.

Sec. 10. And be it further enacted, That the Corporation shall, from time to time, cause the several wards of the City to be so located, as to give, as nearly as may be, an equal number of votes to each ward, and it shall be the duty of the Register of the City, or such officer as the Corporation may hereafter appoint, to furnish the commissioners of election for each ward, on the first Monday in June, annually, previous to the opening of the polls, a list of the persons having a right to vote, agreeably to the provisions of the second section of this act.

Sec. 11. And be it further enacted, That so much of any former act as shall be repugnant to the provisions of this act, be, and the same is hereby repealed.

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act repealed.

Which statutes are still in force and unrepealed. That the lottery, denominated the National Lottery, before mentioned, the ticket of which was sold by the defendants as aforesaid, was duly created by the said Corporation of Washington, and the drawing thereof, and the sale of the said ticket, was duly authorized by the said Corporation, for the objects and purposes, and in the mode directed by the said statute of the Congress of the United States. If, upon this case, the Court shall be of opinion, that the acts of Congress before mentioned were valid, and on the true construction of these acts; the lottery ticket sold by the said defendants as aforesaid, might lawfully be sold within the State of Virginia, notwithstanding the act or statute of the General Assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants. But if the Court should be of opinion, that the statute or act of the General Assembly of the State of Virginia, prohibiting such sale, is valid, notwithstanding the said acts of Congress, then judgment to be entered, that the defendants are guilty, and that the Commonwealth recover against them one hundred dollars and costs.

TAYLOR, *for defendants.*

And thereupon the matters of law arising upon the said case agreed being argued, it seems to the Court here, that the law is for the Commonwealth, and

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that the defendants are guilty in manner and form, as in the information against them is alleged, and they do assess their fine to one hundred dollars besides the costs. Therefore, it is considered by the Court, that the Commonwealth recover against the said defendants, to the use of the President and Directors of the Literary Fund, one hundred dollars, the fine by the Court aforesaid, in manner aforesaid assessed, and the costs of this prosecution, and the said defendants may be taken, &c.

Motion for an
 appeal.

From which judgment the defendants, by their counsel, prayed an appeal to the next Superior Court of law of Norfolk county, which was refused by the Court, inasmuch as cases of this sort are not subject to revision by any other Court of the Commonwealth. Commonwealth's costs, \$31 50 cents.

Costs.

February 18th.

Mr. *Barbour*, for the defendant in error, moved to dismiss the writ of error in this case, and stated three grounds upon which he should insist that the Court had not jurisdiction. (1.) Because of the subject matter of the controversy, without reference to the parties. (2.) That considering the character of one of the parties, if the Court could have jurisdiction at all, it must be *original*, and not *appellate*. (3.) And, finally, that it can take neither original nor appellate jurisdiction.

1. As to the first point. it is conceded by all, that the Federal Government is one of limited powers. This distinguishing trait equally characterises all its departments, it is with the judicial department only, that the present inquiry is connected. It is in the

2d section of the 3d article of the constitution, that we find an enumeration of the objects to which the judicial power of the Union extends. That part of it which relates to the present discussion, declares, that “the judicial power shall extend to all cases in law and equity, arising under this *constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.*” It is not pretended, that any treaty has any sort of relation to the present case: before, then, this Court can take jurisdiction, it must be shown, that this is a case arising either under the constitution, or a law of the United States. I shall endeavour to prove, that it does not belong to either description. These two classes of cases are obviously put in contradistinction to each other, and there will be no difficulty in showing to the Court the difference in their character. The constitution contains two different kinds of provisions; the one, (if I may use the expression,) self executed, or capable of self execution; the other, only executory, and requiring legislative enactment to give them operation; thus, the 2d section of the 4th article, which declares, that “the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;” the 10th section of the 1st article, which prohibits any State from making any thing but gold and silver coin, a tender in payment of debts; from passing any law “impairing the obligation of contracts;” and the prohibition to Congress, in the 9th section, and to the States in the 10th section of the same article, to pass “any bill of attainder, or *ex post facto* law,”

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are all examples of the self-executed provisions of the constitution, by which, I mean to say, that the constitution, in these instances, is, *per se*, operative, without the aid of legislation. On the contrary, the various provisions of the 8th section of the same article, such, for example, "as the power to establish an uniform system of naturalization, and uniform laws on the subject of bankruptcy," are executory only, that is, without an act of legislation, they have no operative effect.

The cases, then, arising under the constitution, are those which arise under its self-executed provisions; and those arising under the laws of the United States, are those which occur under some law, passed in virtue of the executory provisions of the constitution. If this idea be correct, then this is not a case arising under the *constitution*, and it does not correspond with the other part of the description, that is, it does not arise under a *law of the United States*. In the first place, this Court, in the case of *Hepburn v Elzy*,<sup>a</sup> decided, that the District of Columbia was not a State, within the meaning of the constitution, and that, therefore, a citizen of that District could not sustain an action against a citizen of Virginia, in the Circuit Court of that State. Now, it would sound curiously, to call a law passed for a District, not itself exalted to the dignity of a State, a law of the United States. It would seem more strange to call a law passed by the Corporation of Washington, for the local purposes of Washington,

<sup>a</sup> 2 Cranch, 445.

a law of the United States, and yet such is the character of the law under which this case arises, for the act of Congress did not itself create the lottery, but authorized the Corporation of Washington to do it.

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As to this sub-legislation, legislative power is a trust which cannot be transferred. *Delegatus non potest delegare*. If this can be exercised by substitution, other legislative powers can also. I would then inquire, whether in execution of the power "to lay and collect taxes," "to declare war," &c. Congress could authorize the State legislatures to do these things. It is a misnomer, to call by the name of a law of the United States, any act passed for the District of Columbia, though enacted by Congress, without calling in the aid of a Corporation. It has been well observed by a former member of this Court, that every citizen in the United States, sustains a two-fold political character, one in relation to the Federal, the other in relation to the State Governments. To put the proposition in other words, it may be stated thus a two-fold system of legislation pervades the United States; the one of which I will call *Federal*, the other *municipal*. The first belongs by the constitution of the United States to Congress, and consists of the powers of war, peace, commerce, negotiation, and those general powers, which make up our external relations, together with a few powers of an internal kind, which require uniformity in their operation the second belongs to the States, and consists of whatever is not included in the first, embracing particularly every thing con-

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nected with the internal police and economy of the several States. If this system knew no exception in its operation, the present question would never have arisen, for no man would ever dream of calling a law of Virginia or Maryland, a law of the United States. But there are certain portions of territory within the United States, of which the District of Columbia is one, in which there is no State government to act in relation to these, Congress, by the constitution, exercises not only federal, but municipal legislation also and as the whole difficulty in this case has arisen out of this blending together of two different kinds of legislative power; so, that difficulty will be removed by a careful attention to the difference in the nature and character of these powers, and the extent of their operation respectively. Whenever a question arises, whether a law passed by Congress is a law of the United States, we have only to inquire whether it is constitutionally passed in execution of any of the federal powers if it be, it is properly a law of the United States, since the federal powers are co-extensive with the limits of the United States, and this, though the particular act, may be confined to certain persons, places or things. Thus, a law establishing federal Courts in a particular State, is a law of the United States, for though its immediate operation is upon one State, yet it is in execution of a power co-extensive with the United States, but if a law, though passed by Congress, be passed in execution of a municipal power, as a law to pave the streets of Washington, then it cannot, in any propriety of lan-

guage, be called a law of the United States. It is an axiom in politics, that legislative power has no operation, beyond the territorial limits under its authority. I do not now speak of the doctrine of the *lex loci*; of that comity, by which the different States of the civilized world, receive the laws of others, as governing in certain cases of contract, or questions of a civil nature. I speak of the intrinsic energy of the legislative power, its operation *per se*.

If this principle be true, is there any thing in this case to impair its force? It is admitted on all hands, that this law was passed in virtue of the power given by the constitution to exercise exclusive legislation, over such district, not exceeding ten miles square, as should become the seat of the federal government. If we look into the history of the country, the debates of the Conventions, or the declarations of the *Federalist*, we shall alike arrive at the conclusion, that this power was given in consequence of an incident which had occurred in Philadelphia, and the necessity which thence seemed to result, of Congress deliberating uninterrupted and unawed. The motive, then, for granting this power, would not lead to an extension of it, still less will the terms; for, they are as restrictive as could by possibility be used. The district shall not exceed ten miles square, and as was argued in the Convention of Virginia, may not exceed one mile so far from the principle being impaired then, it is greatly strengthened by the language of this provision. See to what consequences we should be led by the doctrine, that because this lottery was authorized by Congress, therefore, the tick-

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ets might be sold in any State, against its laws, with impunity. The same charter authorizes the Corporation of Washington to grant licenses to auctioneers and retailers of spirituous liquors now, upon the doctrines contended for, what will hinder the Corporation from granting licenses to persons, to vend goods and liquors in Virginia, by a Corporation license, contrary to the laws of Virginia ? and thus, greatly impair the revenue which the State raises from these licenses, as it is said, that a saleable quality is of the essence, and constitutes the only value of a lottery ticket, and that therefore it is not competent to any State to abridge the value of that, which was rightfully created by the Legislature of the Union ? Would not the same reasoning justify the holders of these Corporation licenses, equally to trample upon the laws of the State, lest, for want of a market, their merchandise and liquors might not be sold, and thus the value of their license diminished. These are cases, in which the revenue of a State would be impaired, as well as the laws for the protection of its morals. Such is the law of Virginia, prohibiting the use of billiard tables. If Congress should authorise licenses to be issued, by the Corporation of Washington, for using them, and if this law have an operation beyond the territorial limits of the District, then has Virginia lost all power of regulating the conduct of her own citizens.


The solution of the whole difficulty lies in this : That though the laws of Congress, when passed in execution of a federal power, extend over the Union, and being laws of the United States, are a part of

the supreme law of the land: yet, a law passed like the one in question, in execution of the power of municipal legislation, extends only so far, as the power under which it was passed—that is, to the boundaries of the District, that, therefore, it is no law of the United States, and consequently not a part of the supreme law of the land. Nor is there any thing novel in the idea of two powers residing in the same body, at the same time, and over the same subject, of a different kind. The idea is familiarly illustrated by cases of ordinary occurrence in the judiciary. For the same trespass, an action, or indictment, may be brought before the same Court, and a different judgment pronounced, as one or the other mode is pursued. So the same Court has frequently common law and chancery jurisdiction, and pronounces a different judgment in relation to the same subject, as they are exercising the one or the other jurisdiction.

Let us look further at the consequences of calling the laws of the District, laws of the United States. By the sixth article of the Constitution, laws of the United States made in pursuance of the Constitution, are declared a part of the supreme law of the land, and the judges in every State shall be bound thereby, any thing in the laws of their State to the contrary notwithstanding. If, then, laws of the District be laws of the United States, within the meaning of the constitution, it will follow, that they may be carried to the extent of an interference with every department of State legislation, and whenever they shall so interfere, they are to be considered

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of paramount authority Suppose the law of Virginia to declare a deed for land void against a purchaser for valuable consideration, without notice, unless recorded upon the party's acknowledgment, or the evidence of three witnesses. Suppose a law of the District to dispense with record, or to be satisfied with two witnesses. If one citizen should convey to another citizen of the District, land lying in Virginia, in conformity with the District law, upon the principle now contended for, the party must recover, in the teeth of the law of Virginia. It will be admitted, that a law passed, like the one in question, by one State, might be repelled by another it will, also, be admitted, that if Congress had, (as some think they have a right to do, but in which I do not concur,) established here a local legislature, which had passed the law in question, its effects might have been repelled from the States by penal sanctions.

But if it be said, that as the dominion over the District flows from the same source with every other power possessed by the government of the Union, as it is executed by the same Congress, as it was created for the common good, and for universal purposes, that it must be of equal obligation throughout the Union in its effects, with any power known to the constitution, from whence it is inferred, that the law in question can encounter no geographical impediments, but that its march is through the Union. The answer is, that the federal powers of Congress, in their execution, encounter no geographical impediments, because no limits, short of the boundaries

of the Union, are prescribed to them ; but the legislative power over the District, in its execution, does encounter geographical impediments, because the limits of the District are distinctly prescribed, as the bound of its extent, and as an insurmountable barrier to its further march.

It may be said, too, that this case bears no resemblance to that of one State repelling, by penal sanctions, the effects of the laws of another ; because it is said, one State is no party to the laws of another ; whereas here, the law is its own law, as being represented in Congress, and thereby contributing to its passage, and capable in part of effecting its repeal. It will be seen at once, that this principle would prove too much, and, therefore, that it cannot be a sound one ; for if the States are to acquiesce in this instance, because they are represented in Congress, and have, therefore, an agency in making and repealing laws, the same reasoning would justify Congress in legislating beyond their delegated powers ; for example, prescribing a general course of descents. It is obvious, that they might contribute as much to the passage and repeal of this law, as any other, and yet this ground will not be attempted to be sustained. If, then, they are not bound, because of their representation in Congress, to acquiesce in the assumption of a power not granted, they are surely as little bound, upon that ground, to permit a power, confined to ten miles square, to extend its operation with the limits of the United States.

If, then, the law in question is not a law of the United States, in the sense of that expression in the

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constitution, this is not a case arising under the law of the United States, and, consequently, the jurisdiction of this Court fails as to the subject matter.


2. My *second proposition* is, that if this Court could entertain jurisdiction of the case at all, it must be *original*, and not *appellate* jurisdiction. This has reference to the character of one of the parties in the present contest. The constitution of the United States, after having carved out the whole mass of jurisdiction which it gives to the federal judiciary, and enumerated its several objects, proceeds in the second clause of the second section of the third article to distribute that jurisdiction amongst the several Courts. To the Supreme Court, it gives original jurisdiction in two classes of cases, to wit, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party;" in all the other cases to which the judicial power of the United States extends, it gives the Supreme Court appellate jurisdiction. This Court, in the case of *Marbury v. Madison*,<sup>a</sup> thus expresses itself in relation to this clause of the constitution: "If Congress remains at liberty to give this Court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original, and original jurisdiction, where the constitution has declared their jurisdiction shall be appellate, the distribution of jurisdiction made in the constitution, is form without substance." Again, the Court says, "the plain import of the words seems to be, that in one

<sup>a</sup> 1 Cranch, 174.

class of cases, its jurisdiction is original, not appellate ; in the other, it is appellate, not original ;” and accordingly, in that case, which was an application for a *mandamus* to the then Secretary of State, to issue commissions to certain Justices of the Peace in the District of Columbia, the Court, after distinctly admitting that the parties had a right, yet refused to grant the *mandamus*, upon the ground, that it would be an exercise of original jurisdiction , that not being one of the cases, in which that kind of jurisdiction was given them by the constitution, it was not competent to Congress to give it.

It appears, then, from the constitution, that where a State is a party, this Court has original jurisdiction it appears from the opinion of this Court just quoted, that it excludes appellate jurisdiction. But a State is a party to the present case , it is a judgment for a penalty inflicted for the violation of a public law , the prosecution commenced by a presentment of a grand jury, carried on by an information filed by the attorney for the Commonwealth, and the judgment rendered in the name of the Commonwealth , and the case has come before this Court by a writ of error, which is surely appellate jurisdiction. If, then, when a State is a party, this Court have original jurisdiction , if the grant of original, exclude appellate jurisdiction , if, as in this case, a State be a party , and if the jurisdiction now claimed is clearly appellate, then it follows, as an inevitable conclusion, that in this case this Court cannot take jurisdiction in this way, if they could take it at all.

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3. My *last proposition* is, that considering the nature of this case, and that a State is a party, the judicial power of the United States does not extend to the case, and that, therefore, this Court cannot take jurisdiction at all. This is a criminal case, both upon principle and authority. A crime is defined to be, an act committed or omitted in violation of some public law commanding or forbidding it. The offence in this case is one of commission. A prosecution in the name of a State, by information, as this has been shown to be, to inflict a punishment upon this offence, is, therefore, a prosecution for a crime; in other words, a criminal case. Upon authority, too, penal actions are called in the books criminal actions. But if it be a criminal case, it is conceded, that the Courts of the United States cannot take original jurisdiction over it—inasmuch as that right fully belongs to the Courts of the State whose laws have been violated, and that jurisdiction having once rightfully attached, they have a right to proceed to judgment. but if they have no original jurisdiction, I have shown, in the discussion of the second point, that they cannot have appellate jurisdiction, and it consequently follows, that they cannot have jurisdiction at all.

I will now endeavour to show, from general principles, in connection with the fair construction of the third article of the constitution, that without reference to the particular character of the case, whether as criminal or civil, the judicial power of the United States does not extend to it, on account of the character of one of the parties, in other words,

because one of the parties is a *State*. It is an axiom in politics, that a sovereign and independent State is not liable to the suit of any individual, nor amenable to any judicial power, without its own consent. All the States of this Union were sovereign and independent, before they became parties to the federal compact: hence, I infer, that the judicial power of the United States would not have extended to the States, if it had not been so extended to them, *eo nomine*, upon the face of the constitution. But if it can reach them only because it is *expressly given* in relation to them, then it can only reach them to the extent to which it is given. By the original text of the constitution, the judicial power of the Union was extended to the following cases, in which States were parties, to wit, to controversies between two or more States, between a State and citizens of another State, and between a State and foreign States, citizens, and subjects. The case of a contest between a State and one of its own citizens, is not included in this enumeration; and, consequently, if the principle which I have advanced be a sound one, the judicial power of the United States does not extend to it; but the uniform decision of this Court has been, that if a party claim to be a citizen of another State, it must appear upon the record. As that does not appear upon the record in this case, I am authorized to say, that the plaintiffs in error are citizens of Virginia then it is the simple case of a contest between a State and one of its own citizens, which does not fall within the pale of federal judicial power.

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It is said, however, that the judicial power is declared by the Constitution, to extend to all cases in law or equity, arising under this Constitution, the laws of the United States, and treaties made, &c. ; and that by reason of the expression "all cases," where the question is once mentioned in the Constitution, the federal judicial power attaches upon the case on account of the subject matter, without reference to the parties. Notwithstanding the latitude of this expression, it will be seen upon inquiry, that in the nature of things, there must be some limitation imposed upon this provision, which the gentlemen seem to consider unlimited. In the first place there are questions arising, or which might arise under the Constitution, which the forms of the Constitution do not submit to judicial cognizance. Suppose, for example, a State were to grant a title of nobility, how could that be brought before a judicial tribunal, so as to render any effectual judgment ? If it were an office of profit, it might, perhaps, be said, an information in the nature of a *quo warranto* would lie, but I ask whether that would lie, in the case which I have stated, or whether an effectual judgment could be rendered ? It is a title, a name which would still remain, after your judgment had denounced it as unconstitutional. Where a *quo warranto* lies, in relation to an office, the judgment of ouster is followed by practical and effectual consequences. Again, suppose a State should keep troops or ships of war, in time of peace, or should engage in war, when neither actually invaded, nor in imminent danger. Here would be alarming violations of the

constitution, assailing too directly the federal powers, it would be a most serious question arising under the constitution, and yet clearly such a case as this does not belong to the judicial tribunal.

If it be said that the opposite counsel mean all cases in their nature of a judicial character, still I shall be able to show, that broad as this expression is, it does not reach all these. It will be remembered by the Court, that the words are, not all *questions*, but all *cases*. Although, therefore, a *question* may arise, yet before there can be a *case*, there must be parties over whom the Court can take jurisdiction; and if there be no such parties, the Court cannot act upon the subject, though the question may arise, though it may be clearly of a judicial nature, and though there may be the clearest violation of the constitution. By the 11th article of the amendments to the constitution, it is declared, that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State." Now, suppose that a State should, without the consent of Congress, lay a duty on tonnage, which should be paid by a citizen of another State, suppose, too, that a State should cause the lands of a British subject to be escheated, contrary to the ninth article of the treaty of 1794, upon the ground of alienage; or debts due to a British subject from individuals of the United States, or money or shares belonging to him, in the public funds or banks, to be confiscated, contrary to the

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tenth article of the same treaty, and deposite the proceeds in the public chest It will be agreed on all hands, that the first is a palpable violation of the federal constitution, and the two others as palpable violations of the solemn stipulations of a treaty ; and that, therefore, the first presents a question arising under the constitution, and the others one arising under a treaty , yet, will any man contend that the citizen of another State, in the first case, or the subject of the foreign State, in the others, could bring the offending State before the federal Court, for the purpose of redressing their several wrongs ? It will not be pretended, and why not ? for the reason which I have given, that one of the parties in the cases supposed being a State, and the amendment referred to having declared, that a State should not be amenable to the suit of a citizen of another State, or the subject of a foreign State , although the *questions* have arisen, the *cases* have not , that is, the Court cannot take judicial cognizance of the questions, because it cannot bring one of the parties interested in litigating it before them. Let us now suppose, that a State should collect a tonnage duty from one of its own citizens , could that citizen bring his own State before a federal Court ? The words of the 11th amendment apply to the case of a citizen of another State, or the citizen or subject of a foreign State , but the reason is, that it was only to them that the privilege of being parties in a controversy with a State, had been extended in the text of the constitution. It was only from them, therefore, that it was necessary to take away that privilege ,

but, when from those to whom a privilege had been given, that privilege had been taken away, they surely then occupy the same ground, with those to whom it had never been given. When I speak here of the right of these persons under the constitution of suing a State, I speak of the interpretation of this Court, particularly in the case of *Chisholm's ex'rs. v. Georgia*, in which the Court decided, that a State might be made a party defendant. It was that decision which produced the 11th amendment. If I am right in the idea, that since that amendment, no matter what the character of the question, this Court could not take jurisdiction in favour of the citizen of another State, or subject of a foreign State, against a State as defendant, it is equally true, that without the aid of that amendment, it never could take jurisdiction in favour of a citizen against his own State, because that is not one of the cases, in which the federal judicial power extends to States, and because in this case, as in the others, although a question has arisen under the constitution, &c. a case has not arisen, inasmuch as you cannot bring one of the parties before you. That the constitution never contemplated giving jurisdiction to the federal Courts in cases between a State and its own citizens, will appear manifestly, from the only reason assigned for giving it in favour of the citizens of other States, or foreign citizens. That reason was an insufficient one, even for the purpose for which it was assigned, it being, that as against foreigners and the citizens of other States, State Courts might not be impartial where their States were parties - but such as it is, it

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never could apply as between a State and its own citizens, whom they were under every moral and political obligation to protect, and towards whom, therefore, there could be no apprehension of a want of impartiality

Upon a full view of this aspect of the subject, the fair construction of the constitution will be found to be this—that in carving out the general mass of jurisdiction, it had reference only to the natural and habitual parties to controversies, who are either natural persons, or Corporations, short of political societies, not to States, that in relation to these, they could not have been made parties at all, but by express provision, and that, therefore, the extent to which they can be so made, is limited by the extent of that provision. It will be conceded, that the United States cannot be sued and why? Because it is incompatible with their sovereignty. The States, before the adoption of the federal constitution, were also sovereign, and the same principle applies, unless it can be shown that they have surrendered this attribute of sovereignty, which I have endeavoured to show they have not.

Upon my construction, there is consistency throughout the constitution. According to it, a State can never be subjected, at the suit of any individual, to any judicial tribunal, without its own consent, for it can never be made a party *defendant* in any case, or by any party, except in the cases between it, and another State, or a foreign State. If it be a party plaintiff, I have already endeavoured to prove that this

Court could never take appellate, but only original jurisdiction, and that therefore as between a State and any individual, that State never could be placed in the attitude of a defendant. This idea is further sustained by reference to the history of the country. From that we learn, that the great and radical defect in the first confederacy was, that its powers operated upon political societies or States, not upon individuals. The characteristic difference between that and the present government is, that the latter operates upon the citizens. Take, for example, the power of taxation, which addresses itself directly to the people of the United States in the shape of an individual demand—instead of a requisition upon the States, for their respective quotas.

It has been said, that if this doctrine prevail, the federal government will be prostrated at the feet of the States; and that the various limitations and prohibitions imposed upon the States by the constitution, will be a dead letter, upon the face of that instrument, for the want of some power to enforce them. Let it be remembered that the several State legislatures and judiciaries, are all bound by the solemn obligation of an oath, to support the federal constitution, that to suppose a State legislature capable of wilfully legislating in violation of that constitution, if it is to suppose that it is so lost to the moral sense as to be guilty of perjury, a supposition which, thank God! the character of your people forbids us to make, nor can it be realized, until we shall have reached a maturity of corruption, from which I trust we are separated by a long tract of fu-

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ture time. But if the legislatures could be supposed to be so blind to the sacred dictates of conscience and of duty, as to pass such a law, we have another safeguard in the character of the State judiciaries. Before effect could be given to it, it must be supposed that the sanctity of the judicial ermine was also polluted. To him, who can for a moment entertain this unjust and injurious apprehension, I have nothing to say, but to ask him to look at the talents, the virtues, and integrity, which adorn and illustrate the benches of our State Courts, and I will add, that according to the doctrine maintained by this Court, in the case of *Hunter v Martin*,<sup>a</sup> the judgments of the State Courts, in questions arising under the constitution, between individuals, would be subject to the appellate jurisdiction of this Court.<sup>b</sup> But if the States are under limitations by the constitution, so also is the federal government. If the State legislatures may be supposed possibly capable of violating that instrument, and the State judiciaries disposed to sustain

<sup>a</sup> 1 *Wheat. Rep.* 305.

<sup>b</sup> Mr. *Barbour* observed, in reply, that he wished to be distinctly understood, as not yielding his assent to the doctrine of *Hunter v Martin*. On the contrary, that he decidedly concurred with the Court of Appeals of Virginia, that the appellate jurisdiction of the Supreme Court was in relation to inferior federal Courts, not State Courts. But, as that question had been solemnly decided otherwise by this Court, with the argument of the Court of Appeals of Virginia before them, he had forborne to discuss it, he had referred to it, however, because, whilst this Court acted upon the principle of that case, there was a controlling power, on the part of the federal, over the State judiciaries, in practical operation.

them in that violation, it may as well be supposed, that the federal legislature may be thus disposed, and the federal judiciary prepared to sustain them.

Whenever the States shall be determined to destroy the federal government, they will not find it necessary to *act*, and to act in violation of the constitution. They can quietly and effectually accomplish the purpose by not acting. Upon the State legislatures it depends to appoint the Senators and Presidential electors, or to provide for their election. Let them merely *not act* in these particulars, the executive department, and part of the legislative, ceases to exist, and the federal government thus perishes by a sin of omission, not of commission. But I will endeavour in another way to show, that whenever the States shall have reached that point, either of corruption, or hostility, to the federal government, which they must arrive at before any of the extreme supposed violations of the constitution could occur, the jurisdiction now claimed for this Court would be utterly inadequate as a remedy. Let us suppose one of the most glaring violations of the constitution : a bill of attainder or *ex post facto* law, for example, passed by a State, and that the State judiciary proceeds to conviction of the party prosecuted. Let us suppose, that this Court, claiming an appellate jurisdiction, forbids the execution of the party, but the State Court orders its judgment to be executed, and it is executed, by putting to death the prisoner. His life cannot be recalled that is beyond the reach of human power, can you prosecute the judges or the officer for murder ? It will not be contended.

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Of what avail, then, the jurisdiction contended for, even for the purpose for which it is claimed? I answer, of none at all.

Mr. *Smyth* stated, that he should support the motion to dismiss the writ of error granted in this case, for two causes. (1.) Because the constitution gives no jurisdiction to the Court in the case. (2.) Because the judiciary act gives no jurisdiction to the Court in this case.

1. It is a question undecided, whether the appellate jurisdiction of this Court, as declared by the constitution, does or does not extend to this case. If it was in all respects similar to the case of *Hunter v. Martin*,^a adjudged in this Court, I should contend, that the constitutional question of jurisdiction should not be regarded as settled. In that case, the counsel conceded the constitutional question, and no argument has been offered to this Court in support of the jurisdiction of the State judiciary. One of the learned Judges^b of this Court said, in that case, when speaking of the claim of power in this Court to exercise appellate jurisdiction over the State tribunals, "this is a momentous question, and one on which I shall reserve myself uncommitted, for each particular case as it shall occur." And the Court said, that "in several cases, which have been formerly adjudged in this Court, the same point was argued by counsel, and expressly overruled." But the case now before the Court, is very different from that of


^a 1 *Wheat. Rep.* 305.

^b Mr. Justice JOHNSON.

Martin v. Hunter. This is a writ of error to revise a judgment given in a criminal prosecution, and in a case wherein a State was a party.

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The government of the United States being one of enumerated powers, it is not a sufficient justification of the authority claimed, to say that there is nothing in the constitution that prohibits the federal judiciary to take cognizance, by way of appeal, of cases decided in the State Courts. All the powers not granted are retained by the States, judicial power is granted, but it is *federal* judicial power that is granted, and not *State* judicial power. This grant neither impairs the authority of the State Courts in suits remaining within their jurisdiction, nor makes them inferior Courts of the United States. The government of the United States operates directly upon the people, and not at all upon the State governments, or the several branches thereof. The State governments are not subject to this government. The people are subject to both governments. This government is in no respect federal in its operation, although it is, in some respects, federal in its organization. Power has, indeed, been vested, by the constitution, in the State legislatures, to pass certain laws necessary to organize and continue the existence of the general government, and this power Congress may in part assume. They may prescribe the time, place, and manner, of holding elections of representatives, the time and manner of choosing Senators by the State legislatures, and the time of choosing electors of a President. This power is expressly given by

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the constitution, it was necessary Congress should possess it, for self-preservation, and, even in these cases, they have no power to prescribe to the State legislature a legislative act. This government cannot prescribe an executive act to the executive of a State, a legislative act to the legislature of a State, or (as I contend) a judicial act to the judiciary of a State.

If the constitution does not confer on the judiciary of the United States the appellate jurisdiction claimed, it is not enough that the act of Congress may purport to confer it. The framers of the judiciary act manifested a distrust of their authority; they seem to have foreseen that the State Courts would refuse to give judgment according to the opinions of the Supreme Court. The case decided in the State Court was not a case in law arising under the laws of the United States. It was a prosecution under a law of the State. Should a mandate issue in this case, and obedience be refused, this Court will give judgment on a prosecution for violating State laws. If the case decided in the State Court be regarded as a case in which a State was a party, the Supreme Court has, by the constitution, original, and not appellate jurisdiction. The appellate jurisdiction of the Supreme Court is only conferred in cases *other* than those whereof the Supreme Court has original jurisdiction. Who has original jurisdiction of those other cases? The inferior federal Courts. Some of those other cases are those of admiralty and maritime jurisdiction, of which, certainly, it was not in-

tended that the original jurisdiction should be in the State Courts.

If this writ of error be considered to be a suit in law, this Court has no jurisdiction for it is prosecuted against a State ; and, by the 11th amendment to the constitution, no suit in-law can be prosecuted by foreigners or citizens of another State against one of the United States. The amendment prohibits such suits commenced *or prosecuted* against a State. This seems expressly to extend to this writ of error, which, although not a suit in-law commenced against a State, is a suit in law *prosecuted* against a State. This amendment, denying to foreigners and citizens of other States the right to prosecute a suit against a State, and being silent as to citizens of the same State, affords a proof that the federal Courts never had jurisdiction of a suit between a citizen and the State whereof he is a citizen for it cannot be presumed, that a right to prosecute a suit against a State would be taken from a foreigner or citizen of another State, and left to citizens of the same State. A release of all suits is a release of a writ of error ; and, consequently, a writ of error is " a suit in law," and cannot be prosecuted against a State.

The appellate jurisdiction conferred by the constitution on the Supreme Court, is merely authority to revise the decisions of inferior Courts of the United States. Where the Supreme Court have not original jurisdiction, they have, by the constitution, appellate jurisdiction as to law and fact. Could it have

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been intended to confer a power to re-examine decisions in the State Courts, to try again the facts tried in those Courts, and this even in criminal prosecutions? Surely not. Appellate jurisdiction signifies judicial power over the decisions of the inferior tribunals of the same sovereignty. Congress have power to "constitute" such tribunals, and it is made their duty to "ordain and establish" such. The framers of the constitution intended to create a new judiciary, to exercise the judicial power of a new government, unconnected with the judiciaries of the several States. Congress is not authorized to make the Supreme Court, or any other Court of a State, an inferior Court. They do not "constitute" such a Court; they do not "ordain and establish it." The judges cannot be impeached before the Senate of the United States, they receive no compensation for their services from the United States, and, consequently, cannot be required to render any services to the United States. The inferior Courts, spoken of in the constitution, are manifestly to be held by federal judges. The judicial power to be exercised, is the judicial power of the United States; the errors to be corrected are those of that judicial power, and there can be no inferior Courts exercising the judicial power of the United States, other than those constituted, ordained, and established by Congress.

The Supreme Court has appellate jurisdiction in cases to which the judicial power of the United States shall extend, but unless the original jurisdiction has extended to the case, the appellate juris-

diction can never reach it. The original jurisdiction alone is qualified to lay hold of it. If it shall be deemed proper to extend the judicial power to all the cases enumerated, the original jurisdiction must be thus extended. The Court exercising appellate jurisdiction, must not only have jurisdiction over such a cause, and such parties, but it must have jurisdiction over the tribunal before which the cause has been depending. Judicial power, includes power to decide; and power to enforce the decision. This Court has rather disclaimed power to enforce its mandate to the Supreme Court of a State. If you have not power to compel State tribunals to obey your decisions, you have no appellate jurisdiction in cases depending before them. Suppose it should be found necessary to direct a new trial in a cause removed from a State Court, and that the State Court refuses to obey your mandate, where shall the new trial be had? If you have appellate jurisdiction in a case decided by a State Court, you must have power to make your decisions a part of the record of the State Court. The Constitution provides that full faith and credit shall be given in each State, to the judicial proceedings of every other State. A plaintiff recovers in the Courts of Virginia judgment for a sum of money, you reverse the judgment; but, the State Court does not record your decision, the plaintiff obtains a copy of the record of the judicial proceedings of the State, and presents them as evidence before the Court of another State, he must recover, notwithstanding your judgment, which

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has not been made a part of that record, to which full faith and credit is to be given.

To give jurisdiction over the State Courts, it is not sufficient that the constitution has said that the Supreme Court shall have appellate jurisdiction, for that will be understood to signify, jurisdiction over inferior federal Courts. To confer the jurisdiction claimed, the constitution should have said, that the judicial power of the United States shall have appellate jurisdiction over the judicial power of the several States. If it had been intended to give appellate jurisdiction over the State Courts, the proper expressions would have been used. There is not a word in the constitution that goes to set up the federal judiciary above the state judiciary. *The state judiciary is not once named.* The subjects spoken of are the judicial power of the United States, the supreme and inferior Courts of the United States, and the original and appellate jurisdiction of the Supreme Court. Appellate jurisdiction is not granted to the judicial power of the United States. It is granted to the Supreme Court of the United States. Federal judicial power is authorized to correct the errors of federal judicial power. I contend, that in no case can the federal Courts revise the decisions of the State Courts, no such power is expressly given by the constitution and can it be believed that it was meant that the greatest, the most *consolidating* of all the powers of this Government, should pass by an unnecessary implication? The States have granted to the United States power to pronounce their own judgment in certain cases but they have not

granted the State Courts to the federal Government , nor power to revise State decisions.

The power of the House of Lords to hear appeals from the highest Court in Scotland, has been mentioned as a precedent for the exercise of such a power as is claimed for this Court ; but the cases are by no means similar . Scotland is consolidated with England under the same executive and legislature ; and, therefore, ought to be subject, in the last resort, to the same judicial tribunal. If the States had no executive except the President, and no legislature except Congress, the cases would have some resemblance.

If you correct the errors of the Courts of Virginia, you either make them Courts of the United States, or you make the Supreme Court of the United States a part of the judiciary of Virginia. The United States can only pronounce the judgment of the United States. Virginia alone can pronounce the judgment of Virginia. Consequently, none but a Virginia Court can correct the errors of a Virginia Court.

There is nothing in the constitution that indicates a design to make the State judiciaries subordinate to the judiciary of the United States. The argument that Congress *must* establish a Supreme Court, and might have omitted to establish inferior Courts, thereby depriving the Supreme Court of its appellate jurisdiction, unless it should be exercised over the State Courts, seems to be without foundation. The judicial power of the United States is vested in the Supreme Court, *and* inferior Courts , the judges of

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the inferior Courts *shall* receive a compensation. The possibility of Congress omitting to perform a duty positively enjoined on them, cannot change the constitution, or affect the jurisdiction of the State Courts.

The federal judiciary and State judiciaries possess concurrent power in certain cases; but no authority is conferred on the one to reverse the decisions of the other. The State Courts retain a concurrent authority in cases wherein they had jurisdiction previous to the adoption of the constitution, unless it is taken away by the operation of that instrument. I say a concurrent authority, not a subordinate authority. The power of the judiciary of the United States is either exclusive or concurrent, but not paramount power. And where it is concurrent only, then, whichever judiciary gets possession of the case, should proceed to final judgment, from which there should be no appeal. If it shall be established that this Court has appellate jurisdiction over the State Courts in all cases enumerated in the third article of the constitution, a complete *consolidation* of the States, so far as respects judicial power, is produced, and it is presumed that it was not the intention of the people to consolidate the judicial systems of the States, with that of the United States. It has been said, that the Courts of the United States can revise the proceedings of the executive and legislative authorities of the States, and, if they are found to be contrary to the constitution, may declare them to be of no legal validity, and that the exercise of the same right over judicial tribunals, is not a higher or


more dangerous act of sovereign power.<sup>a</sup> This conclusion seems to be erroneous. When the federal Courts declare an act of a State legislature unconstitutional, or an act of the State executive unlawful, they exercise no higher authority than the State Courts exercise, who will not only declare an act of the State legislature, but even an act of Congress, unconstitutional and void. This only proves that the federal and State judiciaries have equally authority to judge of the validity of the acts of the other branches of both governments, and has no tendency whatever to establish the claim set up by federal judicial power, of supremacy over State judicial power.

This writ of error brings up the judgment rendered in a State Court, in a criminal prosecution. Every government must possess within itself, and independently, the power to punish offences against its laws. It would degrade the State governments; and devest them of every pretension to sovereignty, to determine that they cannot punish offences without their decisions being liable to a re-examination, both as to law and fact, (if Congress please,) before the Supreme Court of the United States. The claim set up would make the States dependent for the execution of their criminal codes, upon the federal judiciary. The cases "in which a State shall be a party," of which the Supreme Court may take cognizance, are civil controversies. This seems obvious; because, to the Supreme Court is granted original jurisdiction of them. And it will not be contended

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that the Supreme Court shall have original jurisdiction of prosecutions carried on by a State, against those who violate its laws. If “cases in law and equity, arising under the laws of the United States,” comprehend criminal prosecutions in the State Courts, then every prosecution against a citizen of the State, in which he may claim some exemption under an act of Congress or a treaty, however unfounded the claim, may be re-examined, both as to law and fact, (if Congress please,) in the Supreme Court. And if “controversies” include such prosecutions, then every prosecution against an alien, or <sup>1</sup> citizen of another State, may be so re-examined, whether he claim such exemption or not. Can this Court bring up a capital case, wherein some exemption under a federal law is claimed by a prisoner in a State Court? Would an appeal lie, (should Congress so direct,) from a jury? It would not, even if the trial was had in a federal Court, for the accused has a right to a trial by a jury in the State and district wherein the crime shall be charged to have been committed. In all cases within the appellate jurisdiction of the Supreme Court, that jurisdiction may extend to the law and the fact. But such jurisdiction, as to the fact, cannot extend to criminal cases; consequently, it was not intended that the appellate jurisdiction should extend to criminal cases, and, therefore, the Supreme Court have no appellate jurisdiction in criminal cases. Can, then, the Court take jurisdiction in this case, which was a criminal prosecution, founded on the presentment of a grand jury? Surely they cannot. This case was not a *qui*


*tam* action, which is regarded as a civil suit.<sup>a</sup> It was, both in form and substance, a criminal prosecution. And it has been declared by a judge of this Court, that "the Courts of the United States are vested with no power to scrutinize into the proceedings of the State Courts, in criminal cases."<sup>b</sup>

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That which is fixed by the constitution, Congress have no power to change. The jurisdiction of the State Courts is fixed by the constitution. It is not a subject for congressional legislation. The people of Virginia, in adopting the constitution of the United States, had power to diminish the jurisdiction of the State judiciary but Congress have no power over it; they can neither diminish nor extend it, they can neither take from the State tribunals one cause, or give them one to decide. As they cannot impose on the State Courts any duties, so neither can they take from them any powers. Congress can neither add to or diminish the legislative power, the executive power, or the judicial power of a State, as fixed by the constitution. Congress may pass all laws necessary and proper to execute that power which is vested by the constitution in the judiciary of the United States, but this does not sanction a violation of the authority of the State Courts. None can enlarge or abridge the jurisdiction of the judiciary of Virginia, except the people of Virginia, or the legislature of that State. As was the jurisdiction of the State judiciary on the 4th day of March, 1789, so it stands at this day, unless altered by the

<sup>a</sup> Cowp. 382.

<sup>b</sup> 1 Wheat. Rep. 377.

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State. If on that day the States retained jurisdiction of most of the cases enumerated in the third article of the constitution, that jurisdiction must have been left to them by the constitution, and cannot be taken from them by Congress. The power either of a State legislature or a State judiciary, cannot depend on the use of, or neglect to use, a power, by Congress. Such State power is fixed by the constitution, the same to day as to-morrow, however Congress may legislate.

The judicial power of the United States is conferred by the constitution, and Congress cannot add to that power. Congress may distribute the federal judicial power among the federal Courts, so far as the distribution has not been made by the constitution. If the constitution does not confer on this Court, or on the federal judiciary, the power sought to be exercised, it is in vain that the act of Congress purports to confer it. And where the constitution confers original jurisdiction, (as in cases where a State is a party,). Congress cannot change it into appellate jurisdiction. The extent of the judicial power of the United States being fixed by the constitution, it cannot be made exclusive or concurrent, at the will of Congress. They cannot decide whether it is exclusive of the State Courts or not; *for that is a judicial question, arising under the constitution.* If the judicial power of the United States is exclusive, Congress cannot communicate a part of it to the State Courts, giving to the federal Courts appellate jurisdiction over them. If by the constitution the State judiciary has concurrent jurisdiction,

Congress cannot grant to the federal Courts an appellate jurisdiction over the exercise of such concurrent power. The state judiciary cannot have independent or subordinate power, at the will and pleasure of Congress.

The State judiciary have concurrent jurisdiction, by the constitution, over all the cases enumerated in the third article of the constitution, except, 1. Prosecutions for violating federal laws, 2. Cases of admiralty and maritime jurisdiction; and, 3. Cases affecting ambassadors, other public ministers, and consuls. No government can execute the criminal laws of another government. The States have parted with exterior sovereignty. As they cannot make treaties, perhaps they have not jurisdiction in the case of ministers sent to the federal government. as they cannot make war and peace, regulate commerce, define and punish piracies and offences on the high seas, and against the law of nations, or make rules concerning captures on the water, perhaps they have no admiralty jurisdiction. The jurisdiction of the State Courts over civil causes, arising under the constitution, laws, and treaties, seems to me to be unquestionable. The State judges are sworn to support the constitution, which declares them bound by the constitution, laws, and treaties. This was useless, unless they have jurisdiction of causes arising under the constitution, laws, and treaties, which are equally supreme law to the State Courts as to the federal Courts. The State judges are bound by oath to obey the constitutional acts of Congress, but they are not so bound to obey the decisions of

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the federal Courts · the constitution and laws of the United States are supreme , but the several branches of the government of the United States have no supremacy over the corresponding branches of the State governments.

The jurisdiction of the State Courts is admitted by Congress, in the judiciary act for, by an odious provision therein, which does not seem to be impartial, the decision of the State Court, if given in favour of him who claims under federal law, is final and conclusive. Thus, the State Courts have acknowledged jurisdiction , and if that jurisdiction is constitutional, Congress cannot control it.

Congress cannot authorize the Supreme Court to exercise appellate jurisdiction over the decisions of the State Courts, unless they have legislative power over those Courts. Can Congress give an appeal from a federal District Court to a State Court of appeal ? I presume it will be admitted that they cannot. And why can they not ? Because they have no power over the State Court. And if they cannot give an appeal *to* that Court, they cannot give an appeal *from* that Court.

The constitution provides, that the judicial power of the United States shall “ extend to ” certain enumerated cases. These words signify plainly, that the federal Courts shall have jurisdiction in those cases , but this does not imply exclusive jurisdiction, except in those cases where the jurisdiction of the State Courts would be contrary to the necessary effect of the provisions of the constitution. Civil

suits, arising under the laws of the United States, may be brought and finally determined in the Courts of foreign nations, and, consequently, may be brought and finally determined in the State Courts.

The judiciary of every government must judge of its own jurisdiction. The federal judiciary and the State judiciary may each determine that it has, or that it has not, jurisdiction of the case brought before it but neither can withdraw a case from the jurisdiction of the other. The question, *whether a State Court has jurisdiction or not, is a judicial question, to be settled by the State judiciary*, and not by an act of Congress, nor by the judgment of the Supreme Court of the United States. Shall the States be denied the power of judging of their own laws? As their legislation is subject to no negative, so their judgment is subject to no appeal. Sovereignty consists essentially in the power to legislate, judge of, and execute laws. The States are as properly sovereign now as they were under the confederacy. and we have their united declaration that they then, individually, retained their sovereignty, freedom, and independence. The constitution recognizes the sovereignty of the States for it admits, that treason may be committed against them. They would not be entitled to the appellation of "States" if they were not sovereign.

Although the State Courts should maintain a concurrent jurisdiction with the federal Courts, yet foreigners would have what, before the adoption of the constitution they had not, a choice of tribunals, before which to bring their actions, and the State

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judges are now bound by treaties as suprem law. If an alien plaintiff sues in the State Courts, he ought to be bound by their decision, and if an alien is sued in a State Court, he ought to be bound by the decision of the State in which he resides or sojourns, which protects him, to which he owes a temporary Allegiance, and to whose laws he should yield obedience. The people could not have intended to give to strangers a double chance to recover, while citizens should be held bound by the first decision, that the citizen should be bound by the judgment of the State alone, while the stranger should not be bound but by the judgment of the State, and also of the United States. A statute contrary to reason, is void. An act of Congress which should violate the principles of natural justice, should also be deemed void. It is worthy of consideration, whether this clause in the judiciary act, which grants an appeal to one party, and denies it to the other, is not void, as being partial and unjust. If, in any case brought before them, the State Courts shall not have jurisdiction, the defendant may plead to the jurisdiction, and the Supreme Court of the State will finally decide the point. If this is not a sufficient security for justice, as I apprehend it is, an amendment to the constitution may provide another remedy. If the defendant submits to the jurisdiction of the State Court, and takes a chance of a fair trial, it is reasonable that he should be bound by the result.

As I deny to this Court authority to remove, by writ of error, a cause from a State Court, so I like-

wise deny the authority of this Court to remove, before judgment, from a State Court, a suit brought therein. It will be equally an invasion of the jurisdiction of the State Court, although less offensive in form, than a removal after judgment has been rendered. Congress can neither regulate the State Courts, or touch them by regulation.


Let the Supreme Court declare (for it is a judicial question) what cases are within the exclusive jurisdiction of the federal Courts, by the constitution; and let Congress pass the necessary and proper laws for carrying that power into effect. Although I do not admit that the State Courts would be absolutely bound by such a declaration, yet I have no doubt that the State Courts would acquiesce. It is not for jurisdiction over certain cases that the State Courts contend. It is for *independence* in the exercise of the jurisdiction that is left to them by the constitution.

2. Does the 25th section of the judiciary act comprehend this case, so that the Court may take jurisdiction thereof?

In this case the construction of a statute of the United States is said to have been drawn in question, and the decision in the State Court was against the exemption claimed by the defendant in that Court. This Court has no jurisdiction, if it shall appear that the defendant really had no exemption to set up in the State Court, under a statute of the United States. If the act of Congress has no application, no bearing

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on the case. the Court has no jurisdiction.^a 'The parties cannot, by making an act of Congress, which does not affect the cause, a part of the record, give this Court jurisdiction.

'This Court have said, that "the *sovereignty* of a State in the exercise of its legislation, is not to be impaired, unless it be clear that it has transcended its legitimate authority nor ought any power to be sought, much less to be adjudged, in favour of the United States, unless it be clearly within the reach of their constitutional charter."^b This Court have also said, that "the *sovereign* powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States."^c The State legislatures retain the powers not granted, and not repugnant to the exercise of the powers granted to Congress, and it is not denied, that the legislature of Virginia possessed, previous to the passage of the act of Congress for incorporating the city of Washington, authority to prohibit the sale of lottery tickets in Virginia. That legislature still possesses the power, unless the exercise thereof obstructs some means adopted by Congress for executing their delegated powers.

Actions are lawful or criminal, as the laws of the land determine. Whether an action done in Virginia is lawful or criminal, depends on the laws of that

^a 4 *Wheat. Rep.* 311. *Wheat. Digest*, s. 301. 2 *Wheat. Rep.* 363. 4 *Wheat. Rep.* 314.

^b 5 *Wheat. Rep.* 48.

^c 1 *Wheat. Rep.* 325.


State, unless the action has been authorized or prohibited by Congress in carrying into execution some power granted to them, or the power of some department or officer of the government. The State governments are charged with the police of the States. They, considering certain acts as having a demoralizing tendency, have prohibited them. Shall Congress authorize those very acts to be done within the body of a State ?

So entirely is the police of a State to be regulated by its own laws, that if Congress taxed licenses to sell lottery tickets, the payment of the tax would not confer on him who paid it, any authority to sell tickets contrary to the laws of a State. Congress imposed a tax on licenses to sell spirituous liquors by retail, but that did not prevent the State governments from regarding tippling houses as nuisances, and punishing those retailers of spirits who were not licensed tavern keepers. The license is grantable by the State, when granted, the federal government may tax it, but they have no power to grant it. The police belongs to the State government, and the federal government cannot, by the power of taxation, interfere with the police, so as to legalize any act which a State prohibits.

It is said that a lottery ticket owes it value to its saleable quality. It is true that the saleability of the ticket by the managers is essential to make the lottery of value to the corporation. But, those sales may be made in Washington. And, if they cannot, must the constitution yield to a lottery ? The proprietor of property has not a right every where to

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dispose of it as he pleases. A man may own poison, but he must not sell it as a medicine. He may own money, but he may not, in Virginia, part with it at public gaming. He may come to Washington and purchase a lottery ticket, but if he takes it to Virginia he must not sell it there. A lottery ticket is *a chose in action*, and not assignable by the common law. The State laws determine whether bonds, bills, notes, &c. are assignable. not. Spirituous liquors are property, but they cannot be sold by retail, without the license of the State government.

The act of Congress under which this lottery has been authorized, is not an act passed in the execution of any of those specific powers which Congress may exercise over the States. The acts of Congress must be passed in pursuance of the constitution, or they are void. If they have passed a statute authorizing an act to be done in a State which they had no power to authorize in a State, their statute is void. The acts of Congress, to be supreme law in a State, must be passed in execution of some of the powers delegated to Congress, or to some department or officer of the government. Congress may pass all laws necessary and proper to carry a given power into effect but they must have a given power. Now, what is the given power for the execution of which the sale of lottery tickets in the States is an appropriate means? It is sufficient to show that the act passed is a means of carrying into execution some delegated power. The degree of its necessity or propriety will not be questioned by this Court; but it must obviously tend to the execution

or sanction of some enumerated power. If it shall appear on the face of the act, that it is not passed for the purpose of carrying into effect an enumerated power, and that it is passed for some other purpose, the act would not be constitutional.


As to the object being a national one for which the money is raised by the lottery in question the nation has no particular interest in any thing in the City of Washington, except the public property and buildings belonging to the United States. The improvements to be made in the City by the proceeds of this lottery, are not national buildings for the accommodation of the federal government; they are Corporation buildings for the accommodation of the City, the charge of which is to be borne out of the revenues of the City. But, it is not admitted, that if the money was to be applied to building of the capitol, that Congress would have power, for that purpose, to authorize the sale of lottery tickets in a State, contrary to State laws.

The nation is interested in the prosperity of every city within the limits of the Union. All may be made to contribute to the public treasury—the City of Washington as well as others. If these improvements in the City of Washington are such as the United States should pay for, let the money be advanced from the treasury, and raised by taxes or by loans in a constitutional manner, and let the taxes imposed on the City of Washington, for the purpose of making these improvements, be declared unconstitutional. They doubtless are so if the people of Washington alone are taxed for purposes truly na-

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tional. This measure is not adopted to aid the revenue of the United States. It is adopted for the purpose of aiding the revenue of the City of Washington, for effecting objects which the revenue of the City should effect, but which the ordinary revenue is unequal to. It is to raise an extraordinary revenue for the City of Washington. Virginia, in which State it has been attempted to raise a part of this extraordinary revenue, has no more interest in the penitentiaries and city halls of Washington than in those of Baltimore.

Our opponents must maintain that this is an act of Congress authorizing the sale of lottery tickets in Virginia. For if it is not, the question is at an end. I call upon them to show a power granted to Congress, which the sale of lottery tickets in a State is an appropriate means of executing. Suppose that Congress had passed an act expressly authorizing P & M. Cohen to vend lottery tickets in Virginia, for the purpose of raising a fund to diminish the taxes laid by the Corporation of Washington on the inhabitants, for their own benefit would such an act have been constitutional? Which of the enumerated powers of Congress would such an act have been an appropriate means of carrying into effect? Suppose that Congress had considered lotteries as pernicious gambling could they have prohibited the sale of lottery tickets in the States? It will be admitted that they could not. And if they cannot prohibit the sale of tickets in a State, it is contended that they cannot authorize such a sale. Let us suppose that Congress have passed an act authorizing the sale of lottery

tickets in the States, for the purpose of raising money to build a city hall in the City of Washington : Is such an act within the constitutional powers of Congress ? Is it a mode of laying and collecting taxes ? Or is it a mode of borrowing money ? And is it for the purpose of paying the debts or providing for the general welfare of the United States ? Should it even be said that this lottery is a tax, or a mode of borrowing money, yet the tax is laid, or the money borrowed, not by and for the United States. but by the Corporation for the City of Washington.

Congress have two kinds or grades of power (1.) Power to legislate over the States in certain enumerated cases. (2.) Power to legislate over the ten miles square, and the sites of forts and arsenals, in all cases whatsoever. These powers, so very dissimilar, should be kept separate and distinct. The advocates of the Corporation confound them. They pass the act of Congress by the power to legislate over the ten miles square, unlimited as to objects, but confined within the lines of the District, and they extend its operations over the States, by the power to legislate over them, limited as to objects, but co-extensive with the Union. The act incorporating the City of Washington was certainly not passed to carry into execution any power of Congress, other than the power to legislate over the District of Columbia. If the clause conferring power to legislate in all cases over the ten miles square, had been omitted, could Congress establish lotteries ? Could an act establishing a lottery be ascribed to any of the specific

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powers, in the execution of which. Congress may legislate over all the States ?

If the act authorizing a lottery is justified by the powers which extend to the States, there is no occasion to rest it on the power to legislate in all cases over Columbia. And if it is not justified by the powers which extend to the States, it cannot be justified by that power which, being limited to the District, does not extend to the States. If the act of Congress has effect in Virginia, it is a law over the States, and must have been passed by a power to legislate over the States. Now, a law over the States cannot be passed by a power to legislate over Columbia. But it is the power to legislate over Columbia that has been exercised. Therefore, no law has been passed over the States. Consequently, no law has been passed having effect in the States. It is, then, by the power to legislate over the ten miles square that the authority to sell lottery tickets in the States must be defended.

The power to legislate over the ten miles square, is strictly confined to its limits, and does not authorize the passage of a law for the sale of lottery tickets in the States.^a When Congress legislate exclusively for Columbia, they are restrained to objects within the District. An act of Congress, passed by the authority to legislate over the District, cannot be the supreme law in a State, for if, by the power to legislate, in all cases whatsoever, over the District, Congress may legislate over the States, it will ne-

a Virginia Debates in Convention, vol. 2. p. 21. 29.

cessarily follow, that Congress may legislate over the States in all cases whatsoever.

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The constitution gives to Congress power to exercise exclusive legislation over the ten miles square; in all cases whatsoever. In the case of *Loughborough v. Blake*, the Court said, that "on the extent of these terms, according to the common understanding of mankind, there can be no difference of opinion."^a What is the opinion in which all mankind will unite as to the extent of those terms? Not an opinion that the laws passed in legislating over the District, shall operate in the States. The opinion in which it is presumed that mankind generally will unite, is, that all acts of Congress, not contrary to reason or the restrictions of the constitution, passed in legislating over the District, shall operate exclusively within its limits, but not at all beyond them. The power given to Congress, is power to legislate exclusively in all cases over the District. What are the appropriate means of executing that power? To frame a code of laws having effect within the District only; to establish Courts having jurisdiction within the District only, &c. But what are the powers claimed? Power to repeal the penal laws of a State, power to pass laws "that know no locality in the Union;" laws "that can encounter no geographical impediments;" laws "whose march is through the Union." I admit, that all the powers of Congress, except this of exclusive legislation in all cases, extend throughout the Union, but this, by

^a 5 *Wheat. Rep.* 317.

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the most express words, and from its nature, is local. Yet, in this case, by a power to legislate for a District ten miles square, Congress is made to assume a power to legislate over the whole Union, and because an act is authorized to be done in Columbia, over which Congress may legislate in all cases whatsoever, it is, therefore, to be a legal act when done in a State, the laws of such State notwithstanding.

The power given to Congress to legislate over the District in all cases whatsoever, is precisely of the same extent as if this had been the only power conferred on them. Now, had it been the only power conferred on Congress, could there have arisen any doubt about its extent? When Congress legislate for the District of Columbia, they are a local legislature. The authority to legislate over the District in all cases whatsoever, is as strictly limited as is that of the legislature of Delaware to legislate only over Delaware. The acts of the local legislature have no operation beyond the limits of the place for which they legislate.

If this clause confers on Congress any legislative power over the States, it must be of the kind granted. But the power granted is *exclusive*, and no one will contend, that an exclusive power to legislate over the States is conferred on Congress. The power given extends to *all cases whatsoever*, and no one will contend, that Congress have power to legislate over the States in all cases whatsoever. The grant is of an exclusive power in all cases over ten miles square. The claim set up is a claim of paramount power over the whole United States.

Any single measure which Congress may adopt, must be justified by some single grant of power, or not at all. No combination of several powers can authorize Congress to adopt a single measure which they could not adopt either by one or another of those powers, combined with the power to pass necessary and proper laws for carrying such single power into effect.

There is no repugnancy between the acts of Virginia against selling lottery tickets within that State, and the power granted to Congress to legislate over the District of Columbia. There can be none, for the line of the District completely separates them. The act passed by Congress is confined to the District, the act of the State legislature is confined to the State. How can there be any repugnancy? A power to legislate over Virginia cannot come into collision with a power to legislate over the District, unless those to whom they are entrusted pass the limits of their jurisdiction. It is not alleged, that the legislature of Virginia have passed the limits of their jurisdiction. If Congress have authorized a lottery to be drawn within the city, the sale of tickets, and the drawing of the lottery are thereby legalised within the city. Congress have never said that lottery tickets may be sold in the States. Those tickets may be sold in any place where the local laws will admit. But that they should be sold in Virginia, where such a sale is unlawful, Congress have neither enacted, nor had power to enact. It is said, that without a power to sell the tickets, the power to draw the lottery is

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ineffectual. I answer, if a power to sell lottery tickets necessarily follows a power to draw lotteries, as the lotteries must be drawn in the city, so there the tickets must be sold. The authority to sell is the authority to draw, and as the principal authority (to draw) is confined to the city, so is the consequent authority, (to sell.) Can the Corporation draw lotteries in the States? If not, where is their authority to sell where they have no authority to draw? If the seller of lottery tickets is the agent of the Corporation, then they can clothe him with no legal authority to be executed in a State, contrary to the law of the State. The Corporation must sell their tickets where they have authority, or where they are permitted to sell. If the seller was a purchaser of tickets, and desires to sell again, the City has no interest in that subsequent sale, and the purchaser must sell where he is permitted to sell. Why should the owners of these tickets have an exclusive privilege in Virginia, to sell their tickets, contrary to the laws of the land?

It has been, in effect, maintained, that Congress may not only themselves legislate over the Union, but that they may exercise this power by substitute. Power to legislate over a State must be derived from the people, and cannot be transferred. If the power to legislate over the City may be vested in the representatives of the people thereof, yet, surely, a power to legislate over the States cannot be transferred to the representatives of the people of the City. When Congress pass an act which shall have the

effect of law in the States, it must be passed in pursuance of power delegated to them by the people of the States. The constitution declares, that "all legislative power herein granted shall be *vested* in a Congress of the United States." This vested power cannot be transferred to a Corporation. It must be exercised by Congress, and in the manner prescribed by the constitution. Legislative power is not, in its nature, transferrable. The people do not consent to obey any laws except those passed by their representatives according to the constitution. They who legislate for the nation must represent the nation. The Corporation of Washington cannot receive power to legislate over the people of the United States. To incorporate the people of the City of Washington with power to make by-laws for the government and police of the city, is no transfer of power. It is an authority to exercise an inherent power. There is in every body of people a natural inherent right to legislate for themselves: but small societies must have permission or authority, from the great societies, of which they form a part. Thus, Congress authorized the people of Missouri to form a constitution, and govern themselves. Is this a *transfer* of power? No, certainly: it is an authority to exercise the inherent power of the people in governing themselves. Congress may authorize the people of Washington, or the people of Arkansas, to govern themselves; but it was never heard, until this case arose, that a local Corporation, authorized by Congress to legislate for themselves, could pass laws of

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obligation throughout the Union : laws paramount in the States to the laws of the States.

It seems to have been considered by the advocates of the Corporation, that what Congress authorizes to be done, that they do. This is not so. Congress authorized Missouri to form a constitution , but Congress did not therefore form the constitution of Missouri. The Corporation of Washington were left free to act on the subject of lotteries. They were *empowered* to authorize the drawing of lotteries, and to *pass the laws necessary and proper* for carrying that *power* into effect. The law establishing the lottery in question, is the by-law of the Corporation. The by-laws of the City of London are not acts of Parliament, or laws of the realm , neither have the by-laws of the City of Washington any force beyond the limits of the City.

Congress have not said that the lottery tickets should be sold in the States. They have not even said that there shall be a lottery. Congress empowered the Corporation to pass the law, and the Corporation passed it, the ordinance of the Corporation establishing a lottery, is no more a part of the act of Congress, than the territorial laws now passing in Arkansas will be parts of the acts of Congress. It is not an act of Congress under which these tickets have been sold in Virginia, contrary to the laws of that State it is a by-law of the Corporation of Washington that gave existence to this lottery. An act of Congress does not apply to the case , and therefore this Court have no jurisdiction under the judiciary act.

The powers of the Corporation of Washington are confined within the limits of the City. Being a Corporation for government, all within the corporate limits are subject to them, but no others.^a They cannot make a by-law affecting even their own members, beyond the corporate limits, they have no power to pass a law authorizing the sale of lottery tickets in Georgetown, much less have they the power to authorize the sale of them in a State, contrary to its laws. This by-law either extends beyond the limits of the City, or it does not. If it does, it is void and if it does not, it can have no effect in Virginia. The by-laws of a Corporation are to be subject to the laws of the land, even within their limits. The laws of the States are the laws of the land, within their limits, on subjects not committed to Congress. To those laws all corporate laws are subject.^b But there cannot be that kind of collision between by-laws of the Corporation of Washington and State laws, as between the by-laws of the Corporation of the City of London, and the laws of England. As the by-laws of London may come in collision with the laws of England, but cannot come in collision with the laws of Ireland and Scotland, in those countries, so the by-laws of the Corporation of

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<sup>a</sup> 1 *Bac. Abr* 544. 2 *Comyn's Dig.* 154. 3 *Mod.* 159. 1 *Nels. Abr* 415. *T. Jones* 144. 1 *Nels. Abr* 413. 3 *Yeates*, (Penn.) 478.

<sup>b</sup> 1 *Bac. Abr* 544, 545. 551. *Hobart*, 211. 5 *Co.* 63 and 8 *Co. Rep.* 126.

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Washington may come in collision with the laws of the United States in the ten miles square, but can never come in collision with the laws of a State, for they cannot have operation in a State.

The Court will maintain the powers of Congress as granted by the people, and for the purposes for which they were granted by the people, and will, if possible, to preserve harmony, prevent the clashing of federal and State powers. Let each operate within their respective spheres, and let each be confined to their assigned limits. We are all bound to support the constitution. How will that be best effected? Not by claiming and exercising unacknowledged power. The strength thus obtained will prove pernicious. The confidence of the people constitutes the real strength of this government. Nothing can so much endanger it as exciting the hostility of the State governments. With them it is to determine how long this government shall endure. I shall conclude by again reminding the Court of a declaration of their own, that, "no power ought to be sought, much less adjudged, in favour of the United States, unless it be clearly within the reach of their constitutional charter."


Mr. *D. B. Ogden*, contra, (1.) stated, that he should not argue the general question whether this Court had an appellate jurisdiction, in any case, from the State Courts, because it had been already solemnly adjudged by this Court, in the case of *Martin v Hunter* <sup>a</sup>

<sup>a</sup> 1 *Wheat. Rep.* 304.

2. This is a case arising under the constitution and laws of the Union, and therefore the jurisdiction of the federal Courts extends to it by the express letter of the constitution, and the case of *Martin v. Hunter* has determined that this jurisdiction may be exercised by this Court in an appellate form. But it is said, that the present case does not arise under the constitution and laws of the United States, because the legislative powers of Congress, as respects the District of Columbia, are limited and confined to that District. But, if the law be thus limited in its operation, how is this to be discovered but by examining the constitution? and how is this examination to be had but by taking jurisdiction of the case? In the whole argument, constant reference was had, and necessarily had, to the constitution, in order to decide the case between the parties, upon this question of jurisdiction, and yet it is said to be a case not arising under the constitution. It is also contended, that it is not an act of Congress, the validity of which is drawn in question in the present case, but an ordinance of the Corporation of the City of Washington, and the maxim of *delegatus non potest delegare*, is referred to, in order to show that the Corporation cannot exercise the legislative power of Congress. Is it meant by this to assert that Congress cannot authorize the Corporation to make by-laws? Even the soundness of this position cannot be determined without examining the constitution and acts of Congress, and adjudging upon their interpretation. The whole District of Columbia, and all its subordinate municipal Corporations, are the creatures

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of the constitution , and the acts of Congress, relative to it, must be determined by the constitution; and must be laws of the United States. Are not the extent of the powers vested in Congress, and the manner in which these powers are to be executed, necessarily, questions arising under the constitution, by which the powers are given ? How can the question, whether this is a lottery authorized by an ordinance of the Corporation, and not by a law of the United States, be decided, but by a reference to the laws of the Union, and the constitution under which they were enacted ? The plaintiffs in error set up a right to sell lottery tickets in the State of Virginia, under the constitution and laws of the United States, and the State denies it. By whom is this question to be decided ? It is a privilege or exemption, within the very words of the judiciary act, set up or claimed, by the party, under the constitution and laws of the Union. It is immaterial for the present purpose whether the claim be well or ill founded. The question is, whether the party setting up the claim, is to be turned out of Court, without being heard upon the merits of his case. If you have not jurisdiction, you cannot hear him upon the merits. Upon this motion to quash the writ of error, you can only inquire into the jurisdiction, and cannot look into the merits: but you are asked to turn the party out of Court for defect of jurisdiction, and without giving him an opportunity to show that by the laws and constitution of the Union, he is entitled to the privilege and exemption which he claims. It is no answer to say that

any individual may allege that he has such a privilege, in order to remove his case from the State Court to this, because no injury would ensue, as the case would be sent back with damages and even if there might be some inconveniences, from improperly bringing causes here, they ought rather to be submitted to, than to hazard the possible violation of the constitutional rights of a citizen.

3. It is no objection to the exercise of the judicial powers of this Court, that the defendant in error is one of the States of the Union. Its authority extends, in terms, to ALL cases arising under the constitution, laws, and treaties of the United States, and if there be any implied exceptions, it is incumbent on the party setting up the exception to show it. In order to except the States, it is said that they are sovereign and independent societies, and therefore not subject to the jurisdiction of any human tribunal. But we deny, that since the establishment of the national constitution, there is any such thing as a sovereign State, independent of the Union. The people of the United States are the sole sovereign authority of this country. By them, and for them, the constitution was established. The people of the United States in general, and that of Virginia in particular, have taken away from the State governments certain authorities which they had before, so that they are no longer sovereign and independent in that sense which exempts them from all coercion by judicial tribunals. Every State is limited in its powers by the provisions of the constitution, and whether a State passes those limits, is a question

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which the people of the Union have not thought fit to trust to the State legislatures or judiciaries, but have conferred it exclusively on this Court. The Court would have the jurisdiction without the word *State* being mentioned in the constitution. The term "*all cases*," means *all*, without exception ; and the States of the Union cannot be excepted, by implication, because they have ceased to be absolutely sovereign and independent. The constitution declares that every citizen of one State, shall have all the privileges of the citizens of every other State. Suppose Virginia were to declare the citizens of Maryland aliens, and proceed to escheat their lands by inquest of office · the party is without a remedy ; unless he can look for protection to this Court, which is the guardian of constitutional rights. Because the State, which is the wrong doer, is a party to the suit, is that a reason why he should not have redress ? By the original text of the constitution, there is no limitation in respect to the character of the parties, where the case arises under the constitution ; laws, and treaties of the Union . and the amendment to the constitution respecting the suability of States, merely applies to the other class of cases, where it is the character of the parties, and not the nature of the controversy, which alone gives jurisdiction. The original clause giving jurisdiction on account of the character of the parties, as aliens, citizens of different States, &c. does not limit, but extends the judicial power of the Union. The amendment applies to that alone. It leaves a suit between a State and a citizen, arising under the constitution, laws, &c.

where it found it ; and the States are still liable to be sued by a citizen, where the jurisdiction arises in this manner, and not merely out of the character of the parties. The jurisdiction in the present case arises out of the subject matter of the controversy, and not out of the character of the parties, and, consequently, is not affected by the amendment.

But it is said, that admitting the Court has jurisdiction where a State is a party, still that jurisdiction must be original, and not appellate ; because the constitution declares, that in cases in which a State shall be party, the Supreme Court shall have original jurisdiction, and in all other cases, appellate jurisdiction. The answer is, that this provision was merely intended to prevent States from being sued in the inferior Courts of the Union, that the Supreme Court is to have appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the United States, that where, in such a case, a State sues in its own Courts, it must be understood as renouncing its privilege or exemption, and to submit itself to the appellate power of this Court, since, if the jurisdiction in this class of cases be concurrent, it cannot be exercised originally in the Supreme Court, wherever the State chooses to commence the suit in its own Courts. Nor is there any hardship in this construction. The State cannot be sued in its own Courts, but if it commences a suit there against a citizen, and a question arises in that suit under the constitution, laws, and treaties of the Union, there must be power in this Court to revise the decision of the State Court, in order to

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produce uniformity in the construction of the constitution, &c. So, if a consul sues in the Circuit Court, this Court has appellate jurisdiction, although the consul could not be sued in the Circuit Court. And if the United States, who cannot be sued any where, think proper to sue in the District or Circuit Court, they are amenable to the appellate jurisdiction of this Court. Even granting, therefore, that a State cannot be sued in any case; the State is not sued here: she has sued a citizen, in her own tribunals, who implores the protection of this high Court to give him the benefit of the constitution and laws of the Union. The jurisdiction does not act on the State; it merely prevents the State from acting on a citizen; and depriving him of his constitutional and legal rights.

It is true, there are some cases where this Court cannot take jurisdiction, though the constitution and laws of the Union are violated by a State. But wherever a case is fit for judicial cognizance, or wherever the State tribunals take cognizance of it, whether properly or not, the appellate power of this Court may intervene, and protect the constitution and laws of the Union from violation. Doubtless, a State might grant titles of nobility, raise and support armies and navies, and commit many other attacks upon the constitution, which this Court could not repel. But if these attacks were made by judicial means, or if judicial means were used to compel obedience to these illegal measures, the authority of this Court could, and would, intervene. Nor can

this argument apply to a case, which is entirely judicial in its very origin, and, therefore, steers clear of the supposed difficulty of vindicating the constitution and laws of the Union from violation in other cases which may be imagined.

Neither is this a criminal case. The offence in question is not made a misdemeanour by the law of Virginia. That law merely imposes a penalty, which may be recovered by action of debt, or information, or indictment. The present prosecution is a mere mode of recovering the penalty. But suppose it is a criminal case. The constitution declares, that the Court shall have jurisdiction in ALL cases arising under it, or the laws and treaties of the Union, which includes criminal as well as civil cases, unless, indeed, Congress has refused jurisdiction over the former in the judiciary act, which we insist it has not.

Mr. *Pinkney*, on the same side, (1.) argued, that there was no authority produced, or which could be produced, for the position on the other side, that this Court could not, constitutionally, exercise an appellate jurisdiction over the judgments or decrees of the State Courts, in cases arising under the constitution, laws, and treaties of the Union. The judiciary act of 1789, c. 20. contains a cotemporaneous construction of the constitution in this respect, of great weight, considering who were the authors of that law; and which has been since confirmed by the repeated decisions of this Court, constantly exercising

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the jurisdiction in question.<sup>a</sup> This legislative and judicial exposition has been acquiesced in, since no attempt has ever been made to repeal the law upon the ground of its repugnancy to the constitution: *Transiit in rem judicatam*. But even before the constitution was adopted, and whilst it was submitted to public discussion, this interpretation was given to it by its friends, who were anxious to avoid every objection which could render it obnoxious to State jealousy. But they well knew that this interpretation was unavoidable, and the authors of the celebrated *Letters of Publius*, or the *Federalist*, have stated it in explicit terms.<sup>b</sup>

<sup>a</sup> *Clarke v. Harwood*, 3 *Dall.* 342. *Gordon v. Caldcleugh*, 3 *Cranch*, 268. *Smith v. Maryland*, 6 *Cranch*, 286. *Matthews v. Zane*, 4 *Cranch*, 382. *Owings v. Norwood's Lessee*, 5 *Cranch*, 344. *Martin v. Hunter*, 1 *Wheat. Rep.* 304. *Otis v. Walter*, 2 *Wheat. Rep.* 18. *Miller v. Nicholls*, 4 *Wheat. Rep.* 311. *Gelston v. Hoyt*, 3 *Wheat. Rep.* 246. *M'intire v. Wood*, 7 *Cranch*, 505. *Slocum v. Mayberry*, 2 *Wheat. Rep.* 1. *McCulloch v. Maryland*, 4 *Wheat. Rep.* 316.

<sup>b</sup> "Here another question occurs—what relation would subsist between the national and the State Courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter to the Supreme Court of the United States. The constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance, in which it is not to have an original one, without a single expression to confine its operation to the inferior federal Courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the State tribunals. Either this must be the case, or the local Courts must be excluded

But it is said, that the jurisdiction of the State Courts is concurrent with those of the Union, over that class of cases arising under the constitution, laws, and treaties of the United States. This, however, is not of absolute necessity, but at the discretion of Congress, who may restrain and modify this concurrent jurisdiction, or render it exclusive in the federal tribunals at their pleasure. The supremacy of the national constitution and laws, is a fundamental principle of the federal government, and would be entirely surrendered to State usurpation, if Con-

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from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved, the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and State systems are to be regarded as *ONE WHOLE*. The Courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions. The evident aim of the plan of the convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the Courts of the Union. To confine, therefore, the general expressions, giving appellate jurisdiction to the Supreme Court, to appeals from the subordinate federal Courts, instead of allowing their extension to the State Courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation." No. LXXXIII.

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gress could not, at its option, invest the Courts of the Union with exclusive jurisdiction over this class of cases, or give those Courts an appellate jurisdiction over them from the decisions of the State tribunals. Every other branch of federal authority might as well be surrendered. To part with this, leaves the Union a mere league or confederacy of States entirely sovereign and independent. This particular portion of the judicial power of the Union is indispensably necessary to the existence of the Union. It is an axiom of political science, that the judicial power of every government must be commensurate with its legislative authority : it must be adequate to the protection, enforcement, and assertion of all the other powers of the government. In some cases this power must necessarily be directly exercised by the federal tribunals, as in enforcing the penal laws of the Union. But in other cases, it is merely a *protecting* power, and cannot, from the very nature of things, be exercised in the first instance, by the Courts of the Union. Such are suits between citizen and citizen on contract. Here the State Courts must necessarily have original jurisdiction ; but if the party defendant sets up a defence, founded (for example) upon an act of the State legislature supposed to impair the obligation of contracts, and the decision of the State Court is in favour of the law thus set up, the judicial authority of the Union must be exerted over the cause, or that clause of the constitution which prohibits any State from making a law impairing the obligation of contracts is a dead letter. There is nothing in the constitution which prohibits

the exercise of such a controlling authority. On the contrary, it is expressly declared, that where the *case* arises under the constitution and laws of the Union, the judicial power of the Union *shall* extend to it. It is the *case*, then, and not the *forum* in which it arises, that is to determine whether the judicial authority of the Union shall be exercised over it. But there is a class of cases which must necessarily originate in the State tribunals, because it cannot be known at the time the suit is commenced, whether it will or will not involve any question arising under the constitution and laws of the Union. Over this class of cases, then, the Courts of the Union must have appellate jurisdiction. The *appellate* power of this Court is extended by the constitution to all cases within the judicial authority of the Union, and not included within the *original* jurisdiction of this Court. Its appellate power, so far as respects the constitution, depends, then, on two questions only - is the case within the judicial power of the Union ? and is it within the original cognizance of this Court ? The first question being answered affirmatively, and the second negatively, the appellate power under the constitution is completely established in any given case.

But the power of removing this class of causes, *pendente lite*, is also denied ; and it is said, that the authority to remove, before judgment, a suit brought in the State Court, into the federal Court, is repugnant to the constitution. In *Martin v. Hunter*, the argument was the other way, and it was insisted, that Congress ought to have given to this Court the

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power of *evoking* this description of causes from the State tribunals, the moment any question arose respecting the constitution and laws of the Union, in order to avoid the offensive exercise of an appellate jurisdiction over the State Courts.<sup>a</sup> *Quacunque via data*—it is immaterial, for the power of removal, if it be not unconstitutional, is an appellate power, and analogous to a writ of error. If it be unconstitutional, the necessity for the controlling power of a writ of error, is only the more manifest. Take away both, and the constitution, laws, and treaties of the Union lie at the mercy of the State judicatures.


Again. It is said, that the judges of the State Courts take an oath to support the constitution of the Union, and the laws and treaties of the Union are their supreme law: and it is inferred, that the constitution reposes implicit confidence in them, and there ought to be no revision of their judgments. But, it may be asked, if the constitution reposes this implicit confidence in the State tribunals, why does it authorize the establishment of federal Courts, which, upon this supposition, would be wholly useless? And why are the members of the State legislatures and executives required to take the same oath? They are bound to support the constitution by the same solemn sanctions, and yet their acts may confessedly be set aside by the national judicatures, as being repugnant to that constitution. The actual constitution of this country is not a government of confidence; it is a scheme of government

<sup>a</sup> 1 *Wheat. Rep.* 319.


conceived in the spirit of jealousy, and rendered adequate to all its own purposes, by its own means : and the judicial power of the Union is the principal means of giving effect to it. This it is which distinguishes it from the Confederation. Experience has shown the necessity and wisdom of this provision. If the State Courts may adjudicate conclusively for the Union, why may not the State legislatures legislate for it, and where is the utility of distinct and appropriate powers, if it cannot maintain them from violation ? In *Martin v. Hunter*,<sup>a</sup> the Court considered this argument fully, and thought it operated the other way. The care which the constitution takes to make the State Courts respect it, and the laws and treaties made under it, proves that it was supposed that cases might come before them by original suit, which would involve the rights and interests of the Union, and lay a foundation for appeal or revision. This was anticipated, and the constitution endeavours to make the first decision correct, by the sanction of an oath. But it does not improvidently rely upon that alone. The judges of the inferior Courts of the Union take the same oath, and lie under the same obligation, but they are not the less subject to the appellate jurisdiction of the Supreme Court.

But it is asked, can Congress grant an appeal from the District or Circuit Court, to a State Court ? The question is answered in the negative, and it is thence inferred that they cannot grant an appeal

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from a State to a federal Court. This seems to imply that you can do nothing unless you can do its opposite. Such a proposition would repeal all the physical and moral laws of the universe. As well might it be asked, can Congress grant an appeal from the Supreme to the District Court, and because there is something absurd in the idea of an appeal from a superior to an inferior tribunal, it would be inferred that the opposite appeal could not be granted. But, until the relation of supreme and subordinate is destroyed, the State laws and judicatures must be considered as subordinate to those of the Union, in all cases within the scope of its powers and jurisdiction. Such was once the doctrine asserted by Virginia herself, and to which it is confidently believed she will revert in a moment of calmer reflection.

*a* The learned counsel here read the following resolutions of the legislature of Virginia.


Extract from the Journal of the Senate of the Commonwealth of Virginia, begun and held at the Capitol in the City of Richmond, the 4th day of December, 1809.

*Friday, January 26, 1810.* "Mr. Nelson reported from the Committee to whom were committed the preamble and resolutions on the amendment proposed by the legislature of Pennsylvania, to the constitution of the United States, by the appointment of an impartial tribunal to decide disputes between the State and federal judiciary, that the Committee had, according to order, taken the said preambles and resolutions under their consideration, and directed him to report them without any amendment. And on the question being put thereupon, the same were agreed to unanimously, by the House, as follows The Committee to whom was referred the communication of the Governor of Pennsylvania, covering certain reso-

2. It is further contended on the other side, that this Court has no jurisdiction of the present case, because the writ of error presents no question aris-

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lutions of the Legislature of that State, proposing an amendment to the constitution of the United States, by the appointment of an impartial tribunal to decide disputes between the State and federal judiciary, have had the same under their consideration, and are of opinion that a tribunal is already provided by the Constitution of the United States, to wit The Supreme Court, more eminently qualified from their habits and duties, from the mode of their selection, and from the tenure of their offices, to decide the disputes aforesaid, in an enlightened and impartial manner, than any other tribunal which could be created. The members of the Supreme Court are selected from those in the United States who are most celebrated for virtue and legal learning, not at the will of a single individual, but by the concurrent wishes of the President and Senate of the United States, they will, therefore, have no local prejudices and partialities. The duties they have to perform lead them necessarily to the most enlarged and accurate acquaintance with the jurisdiction of the federal, and several State Courts, together with the admirable symmetry of our Government. The tenure of their offices enables them to pronounce the sound and correct opinions they may have formed, without fear, favour, or partiality. The amendment to the constitution proposed by Pennsylvania, seems to be founded upon the idea that the federal judiciary will, from a lust of power, enlarge their jurisdiction, to the total annihilation of the jurisdiction of the State Courts, that they will exercise their will instead of the law and the constitution. This argument, if it proves any thing, would operate more strongly against the tribunal proposed to be created, which promises so little, than against the Supreme Court, which, for the reasons given before, have every thing connected with their appointment, calculated to insure confidence. What security have we, were the proposed amendment adopted, that this tribunal would not substitute their will

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sing under the constitution or laws of the United States. And to show this, it is said that the record speaks only of the *validity* of the act of Congress,

and their pleasure in place of the law ? The judiciary are the weakest of the three departments of government, and least dangerous to the political rights of the constitution. They hold neither the purse nor the sword, and even to enforce their own judgments and decrees, must ultimately depend upon the executive arm. Should the federal judiciary, however, unmindful of their weakness, unmindful of the duty which they owe to themselves and their country, become corrupt, and transcend the limits of their jurisdiction. would the proposed amendment oppose even a probable barrier to such an improbable state of things ? The creation of a tribunal such as is proposed by Pennsylvania, so far as we are enabled to form an idea of it, from the description given in the resolutions of the legislature of that State, would, in the opinion of your Committee, tend rather to invite, than prevent a collision between the federal and State Courts. It might also become, in process of time, a serious and dangerous embarrassment to the operations of the general Government.


Resolved, therefore, that the legislature of this State do disapprove of the amendment to the constitution of the United States proposed by the legislature of Pennsylvania.

Resolved, also, that his excellency the Governor be, and is hereby requested to transmit forthwith, a copy of the foregoing preamble and resolutions to each of the Senators and Representatives of this State, in Congress, and to the executives of the several States in the Union, and request that the same be laid before the legislatures thereof."

Extract from the Journal of the House of Delegates of the Commonwealth of Virginia

" *Tuesday, January 23, 1810.* The House, according to the order of the day, resolved itself into a committee of the whole house on the state of the Commonwealth, and after some time spent therein, Mr. Speaker resumed the chair, and

and nobody denies its validity, and therefore no question arises under an act of Congress. But the words of the judiciary act are pursued by this writ of error, as they always have been in other cases. It is the validity of the act of Congress, and the validity of the act of Virginia, as compared with it, which are drawn into question. The Court below decided against the first, and in favour of the last, to the full extent of the case. The validity of the act of Congress, means the effect attributed to it by the defendant who sets it up as a defence against so much of the act of the State as inflicts a penalty upon him for doing what the act of Congress authorizes. The defendant relies upon the act of Congress, as creating an exception in favour of his case, out of the act of Virginia. He says it is valid, or available, or efficacious to create such an exception. That was the question which the record shows was before the Court below, and the Court decided that it was not so valid, or available, or efficacious. Whether it is so or not, is the question which the writ of error presents for inquiry; and it is such a question as the

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Mr. Robert Stanard reported that the committee had, according to order, had under consideration the preamble and resolutions of the select committee to whom were referred that part of the Governor's communication which relates to the amendment proposed to the Constitution of the United States, by the legislature of Pennsylvania, had gone through the same, and directed him to report them to the House without amendment; which he handed in at the clerk's table, and the question being put on agreeing to the said preamble and resolutions, they were agreed to by the House unanimously.


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appellate power of this Court can deal with. But the question on this motion to dismiss the writ of error, is not whether the act of Congress is valid as against the act of Virginia ; but whether that question is presented by the record, so that this Court can determine it, after it has concluded to entertain the writ of error. It is the *claim* of a right, privilege, or exemption under the statute of the United States, which gives the jurisdiction.^a The decision upon that claim, as it appears upon the record, is the *exercise* of the jurisdiction. That the claim to exemption appears upon the record, cannot be deemed in this case more than any other. The claim may even be an absurd one : but this Court cannot be called upon, on a motion to dismiss the writ of error, to condemn it as such. All argument upon the sufficiency of the claim is premature, so long as it is, *sub judice*, whether the Court can examine its sufficiency.

But it is said, that the question does not arise under any statute of the United States, but under a mere by-law of the City of Washington, and that the case involves nothing but that by-law and it is said to be absurd to call a by-law of the City of Washington a law of the United States. It is immaterial whether it be so or not. The by-law is the execution of a power given by a law of the United States. The effect of the execution of that power, involves the effect of the law, and although the execution of the power is not a law of the United

^a *Wheat. Dig. Dec. tit. Const. Law, V (B.) 186.*

States, yet that which gives the power is. The question, therefore, is, not what is the mere effect of the execution of the power in the abstract, or unconnected with the law which gives it, but what is the effect of the power by force of the law which gives it and that question compels you to mount up to the constitution itself.

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The course of the inquiry will then be, (1.) What has the party done ? and what is the immediate authority under which he did it ? (2.) What is the nature and extent of that authority ? what its qualities under the law which gave it, and the constitution under which that law was passed ?

If an officer of the United States does any act for which a State Court calls him to account, and he relies in his defence upon the authority, real or supposed, of a statute of Congress, his act is not a law of the United States ; but his defence is referred to the effect and validity of a law of the United States, and that is again referred to the constitution, which is the paramount law. The last act done need not be a law of the United States. It is sufficient, if it is attempted to be justified, or its consequences maintained, under a law of the United States, which it is alleged gave to it a protecting power in the case before the Court.

It is, however, asserted, that the constitution gives jurisdiction only in cases arising under it, or the laws, or treaties of the United States, and that this case does not arise under a law of the United States, because the act of Congress now in question is not a law of the United States. An act of the Congress,

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in its capacity of local sovereign of the District of Columbia, is said not to be a law of the United States. But whose law, then, is it? The United States in Congress assembled, are the local sovereigns of the District, and it is by them that this law is passed. Is it less a law of the United States, because it does not operate directly upon the Union at large? A statute is not a law of the United States on account of the subject on which it acts being limited or unlimited. It is a law of the United States, because it is passed by the legislative power of the United States. The legislative authority over the District of Columbia, is that of the Union. Its sphere is limited, but the power itself is even greater than the general federal power of the Union. It is the power of the People and the States combined; exerted upon their peculiar domain. It is the same Congress which passes both description of laws. The question, whether the law operates beyond the District, is the question upon the merits hereafter to be discussed.

Again; it is said, that the by-law alone is in question, and not the act of Congress because the by-law is not passed by virtue of the act of Congress, but by virtue of the inherent power of the people of the District to govern themselves. The act of Congress only calls this inherent power into action: and this inherent power, when so called into action, is the only power which this Court can deal with. The fallacy of this argument consists in its confounding inherent power with an inherent capacity to receive power. The subordinate legislative power of the

territories and Districts, which belong to the Union in full sovereignty, is not their power, but that of their superior. But admit this abstract doctrine of inherent power - the question still recurs, what is the constitutional effect of this power being excited into action by the paramount power. The action of the inherent power will still depend upon the power by which it is set in motion, and what it can, or cannot do, under that impulse, is just the same question with the other.

It is also objected, that a law emanating from the local power of Congress over the District of Columbia, cannot bind the Union. But whether it can or not is the very question to be determined; when the merits come to be discussed; which the writ of error gives authority to decide, and which cannot be decided without entertaining the writ of error. The argument on the other side, proceeds in a vitious circle. It is asserted, that you must quash the writ of error, because you have no jurisdiction over the case or question. It is, then, said, that you must take jurisdiction of, and inquire into, the case and the question, in order that you may dismiss the writ of error. or, in other words, you have, and you have not, jurisdiction over the case and question, and you ought to decide them in order to see that you ought not to decide them. And here again the supposed absurdity of the claim of protection, by the defendant on the record, against the act of Virginia, is urged to authorize a refusal to inquire upon the writ of error, whether it is absurd or not.


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3. The next ground of objection to the jurisdiction is, that the writ of error is itself a suit against a State by a citizen of that or some other State. And *Bac. Abr. tit. Error, (L.)* is cited as an authority to show that a release of all suits is a release of a writ of error. But, even admitting that it may sometimes be technically called a suit, it is not such a suit as is contemplated by the constitution. A writ of error, where a party is to be restored to something, may be released by a release of all suits or actions, because in this respect it resembles an action. But this writ of error is not a suit, because the party is not to be restored to any thing. A reversal of the judgment below will leave things just as they were before the judgment. But the State of Virginia is not compelled to come into this Court by the writ of error. A citation, or *scire facias ad audiendum errores*, is only notice to the State, leaving it at her option voluntarily to appear. It does not act compulsorily upon the State. It acts upon the Court, which she has used as the instrument to enforce her law. A case is presented by the interference of the judiciary of the State, for the interposition of the appellate power of this Court. The object is to reverse the judgment, and that done, there is an end of the exercise of power. The United States are liable to the same coercion. They may be called before this Court in the same manner, and the judgments obtained in their favour may be reversed. And is it then derogatory to the sovereignty of a particular State, that its judgments should be liable to be controlled in the same manner, in cases within the ju-

dicial power of the Union ? This control is exerted upon the judiciary ; upon the judgments of the judiciary. The State is incidentally affected , but that has been already determined in this Court to be immaterial.<sup>a</sup> Nor is this sort of control more exceptionable than that which is constantly exercised, in suits between private parties, over the acts of the State legislatures and executives, upon the same ground of their repugnancy to the constitution and laws of the Union.

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If it be asked whether you can give costs against the State, and enforce the payment ; the answer is, that you cannot do so in any case upon a mere reversal of a judgment. And even if you could in a case between private parties, is it any objection to the appellate jurisdiction of this Court, where the United States are plaintiffs below, that you cannot award and enforce the payment of costs against them ? It is not jurisdiction over the State of Virginia that is claimed, but over a question arising under the laws of that State, and over the judgments of her Courts construing those laws. This point is incidentally touched in *Martin v Hunter*, in considering the question as to removal of suits, before judgment, and it is there said by the Court that the remedy of removal of suits would be utterly inadequate to the purposes of the constitution, if it could act only on the *parties*, and not upon the *State Courts*.<sup>b</sup>

<sup>a</sup> *Wheat. Dig. Dec. tit. Const. Law*, V. (C.) 211.

<sup>b</sup> 1 *Wheat. Rep.* 350.

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4. Lastly. It is insisted, for the defendant in error, that this Court has no jurisdiction in the present case, because a State is a party to the original controversy which the writ of error brings before the Court. That the jurisdiction of this Court in all cases, where a State is a party, is *original*, and therefore it cannot have *appellate* jurisdiction in this case.

The obvious answer to this argument is, that the jurisdiction now claimed does not arise under that part of the constitution which gives original jurisdiction to the Supreme Court in cases in which a State is a party, but the jurisdiction is asserted under that clause which gives the federal judiciary cognizance of all cases arising under the constitution, laws, and treaties of the United States, without regard to the character of the parties. In this latter class of cases the Supreme Court has appellate jurisdiction. In some of this description of cases, the jurisdiction could not be originally exercised. The penal laws of a State cannot be originally enforced, or enforced at all, by a judicature of the Union. They cannot therefore form the subjects of, or create subjects for, its original jurisdiction. The Courts of the United States can here exert only a controlling or restraining power for the protection of the rights of the Union, and this can only be done by appeal or writ of error. This view of the subject is taken in *Martin v. Hunter*. The Court there says, "Suppose an indictment for a crime in a State Court, and the defendant should allege in his defence, that the crime was committed by an *ex post facto* act of the State, must not the State Court, in


the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the sufficiency and validity of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated in illustration of the position, and unless the State Courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs of a most enormous magnitude would inevitably ensue."<sup>a</sup> So the Court afterwards say, in the context of the passage before cited, speaking of the inadequacy of the remedy of removal of suits to accomplish the purposes of the constitution, "in respect to criminal prosecutions, the difficulty seems admitted to be insurmountable,"<sup>b</sup> &c. What difficulty? The difficulty of controlling them by the Courts of the United States without the aid of a writ of error, because those Courts could take no original cognizance of this description of cases, and they could not be removed before judgment. As, then, the federal Courts have no original jurisdiction of cases arising merely under the constitution, laws, and treaties of the Union, it follows, that the clause of the constitution which speaks of cases in which a State shall be a party, does not apply to it. and the appellate power, now in question, is to be sought for in that part of the same article which declares, that the judicial power of the Union shall extend to all cases arising under the

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<sup>a</sup> 1 *Wheat. Rep.* 341.<sup>b</sup> 1 *Wheat. Rep.* 350.

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constitution, laws, and treaties of the Union, coupled with the subsequent provision, which declares, that in all cases to which that judicial power extends, this Court shall have *appellate*, where it has not *original* jurisdiction, with such exceptions, and under such regulations as Congress may prescribe. That it has appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the United States, is established by the authority of the case of *Martin v Hunter* and that this appellate power is competent to control the State Courts, is also proved by that case.<sup>a</sup> There is, therefore, no open question but this, does the fact of a State being a party prosecutor in the State Court, make this case an exception, and take it out of the general rule? Upon the plain policy and purpose of the constitution it does not. This jurisdiction has already been shown to be different in its nature from the original jurisdiction which was exercised over States before the amendment of the constitution. But that other jurisdiction will go far to show, that there is nothing unnatural in giving appellate power over State Courts in cases where a State is a party plaintiff. The constitution authorized direct coercion over States or private citizens indifferently. The amendment has partly taken this away, but the spirit of the constitution is still manifested by the former provision. The same constitution also authorized appellate control over State Courts; and is it natural that it should condemn the same control, merely be-

<sup>a</sup> 1 *Wheat. Rep.* 304.

cause a State has obtained the judgment to be revised? The constitution had no delicacy with regard to States on this matter. It considered them as directly amenable where original jurisdiction can be exerted. Why not empower its tribunals to affect their interests in an appellate form, by acting, not on the State, but on its Courts, as unquestionably it does in all cases where individuals are parties below? The appellate power is trifling, compared with the original as it formerly stood and a constitution which gave the last could have no scruples about the first. The appellate control is respectful to the State sovereignties compared with the original, and it stands upon high considerations of self defence, upon grounds of constitutional necessity not applicable to the other. The suability of the States might have been dispensed with, and the constitution still be safe. But the judicial control of the Union over State encroachments and usurpations, was indispensable to the sovereignty of the constitution—to its integrity—to its very existence. Take it away, and the Union becomes again a loose and feeble confederacy—a government of false and foolish confidence—a delusion and a mockery! Why is it in cases, in which individuals are parties in a State Court, that the judgment may be revised in this Court? Because the judiciary of the Union ought to possess ample power to preserve the constitution, and laws, and treaties of the Union, from violation by other judicatures. Its judicial powers should be commensurate with its other powers, and rights, and prerogatives. They might else be evaded and

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trampled under foot by judicatures in which the constitution does not confide. This high motive is as strong, at least, where a State is plaintiff or prosecutor in its own Courts, as where it is not. Indeed, it is far stronger, for all the motives to judicial leanings and partialities here operate in their fullest force, though the State judges may not be conscious of their influence. The sovereignty of the State law—State pride—State interests—are here in paramount vigour as inducements to error; and judicial usurpation is countenanced by legislative support and popular prejudice. Let the Court look to the consequences of this distinction. A State passes a law repugnant to the national constitution. It gives a remedy in the name of an individual—a common informer. You may control this law, if the State judiciary acts upon it. But the State may avoid this (as it seems) by authorizing the remedy in its own name; and you thus lose your protecting jurisdiction over the subject, although you might still exercise it, as in the other case, in the inoffensive mode of confining your control to the State judiciary. The whole constitution of the Union might thus be overturned unless force should be resorted to: and the object of the constitution was to avoid force, by giving ordinary judicial power of correction.

It has been said that a sovereign State of the Union is not amenable to judicature, unless made so by express words—*eo nomine*. I deny this as respects appellate jurisdiction, which acts, not on the State, but on its Courts. The words of the consti-

tution are sufficiently express, and all reason is on that side especially since it is, or must be admitted, that these Courts may be thus controlled, and the legislative power of the State be reached through them, and controlled also and especially too, when the constitution has not scrupled, in other cases, to subject the States to direct control.

But it is contended, that there are cases arising under the constitution and laws of the Union, which, from their very nature, are not the subjects of judicial cognizance, and consequently are exceptions out of the general grant of judicial power under the constitution, such as the prohibition to the States to grant titles of nobility, &c. and that the present case may be such an exception. But the very supposition admits, that if the case in question is suited to the exertion of judicial power, it is not an exception. and the moment a State judiciary intervenes, judicial jurisdiction can, and ought to be exerted. It is unnecessary to inquire how the case must, in general, exist, in order to become the proper object of judicial cognizance, for here it does exist in a proper shape for that purpose. A State Court has intervened, and the regular appellate power of this Court may act. Nor does the proof of some exceptions arising from necessity, establish other exceptions free from that necessity. Many unlawful things cannot be restrained by judicature but does it follow that where they can be restrained, they shall not?

Again It is said that the States may destroy the federal Government at their pleasure, merely by for-


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bearing to elect Senators, and to provide for the election of a President and Representatives, and that the authority of the Union is incompetent to coerce them. Such extreme arguments prove nothing to the present purpose but suppose the States could not be coerced in such a case to do their duty, because no intervening Court or agent is necessary to the accomplishment of such a desperate purpose, does this prove that you cannot defensively control active violations of the constitution or laws, when a controllable judicature or agent intervenes to perpetrate these violations ?

It is also said, that this is a prosecution under a penal statute, and that criminal cases peculiarly belong to the domestic forum. The answer is, that so was the case of *McCulloch v. Maryland*, a *quintam* action, under a penal law of that State, giving one half of the penalty to the State, and the other half to the informer ; yet this Court did not consider the nature of the suit, or the circumstance of a State being a party, as forming a valid objection to the jurisdiction.<sup>a</sup> Nobody objects to a State enforcing its own penal laws all that is claimed is, that in executing them, it should not violate the laws of the Union, which are paramount *Sic utere tuo ut alienum non lædas*.

The other suppositions which have been stated of bills of attainder and *ex post facto* laws passed by the States, and attempted to be executed, but decided by this Court to be unconstitutional, and yet the

<sup>a</sup> 4 *Wheat. Rep.* 316.

State Courts persisting in carrying them into effect, even in capital cases, are too wild and extravagant, to illustrate any question which can ever practically arise.

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Mr. Chief Justice MARSHALL delivered the opinion of the Court. *March 3d.*

This is a writ of error to a judgment rendered in the Court of Hustings for the borough of Norfolk, on an information for selling lottery tickets, contrary to an act of the Legislature of Virginia. In the State Court, the defendant claimed the protection of an act of Congress. A case was agreed between the parties, which states the act of Assembly on which the prosecution was founded, and the act of Congress on which the defendant relied, and concludes in these words. "If upon this case the Court shall be of opinion that the acts of Congress before mentioned were valid, and, on the true construction of those acts, the lottery tickets sold by the defendants as aforesaid, might lawfully be sold within the State of Virginia, notwithstanding the act or statute of the general assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants: And if the Court should be of opinion that the statute or act of the General Assembly of the State of Virginia, prohibiting such sale, is valid, notwithstanding the said acts of Congress, then judgment to be entered that the defendants are guilty, and that the Commonwealth recover against them one hundred dollars and costs."

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Judgment was rendered against the defendants; and the Court in which it was rendered being the highest Court of the State in which the cause was cognizable, the record has been brought into this Court by writ of error.^a

The defendant in error moves to dismiss this writ, for want of jurisdiction.

In support of this motion, three points have been made, and argued with the ability which the importance of the question merits. These points are—

1st: That a State is a defendant.

2d. That no writ of error lies from this Court to a State Court.

3d. The third point has been presented in different forms by the gentlemen who have argued it. The counsel who opened the cause said, that the want of jurisdiction was shown by the subject matter of the case. The counsel who followed him said, that jurisdiction was not given by the judiciary act. The Court has bestowed all its attention on the arguments of both gentlemen, and supposes that their tendency is to show that this Court has no jurisdiction of the case, or, in other words, has no right to review the judgment of the State Court, because neither the constitution nor any law of the United States has been violated by that judgment.

The questions presented to the Court by the two

^a The plaintiff in error prayed an appeal from the judgment of the Court of Hustings, but it was refused, on the ground that there was no higher State tribunal which could take cognizance of the case.

first points made at the bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review, and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole, and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the Courts of every State in the Union. That the constitution, laws, and treaties, may receive as many constructions as there are States, and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry, affirms that the decision he asks does not depend on inquiry.

If such be the constitution, it is the duty of the Court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this Court to say so, and to perform that task which the American people have assigned to the judicial department.

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The jurisdiction of this Court, under the 25th section of the Judiciary Act of 1789, c. 20, is not excluded by the circumstance of the character of the parties, as one of them being a State, and the other a citizen of that State.

1st. The first question to be considered is, whether the jurisdiction of this Court is excluded by the character of the parties, one of them being a State, and the other a citizen of that State?

The second section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the Courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between two or more States, between a State and citizens of another State," "and between a State and foreign States, citizens or subjects." If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union.

The counsel for the defendant in error have stated that the cases which arise under the constitution must grow out of those provisions which are capa-

ble of self-execution, examples of which are to be found in the 2d section of the 4th article, and in the 10th section of the 1st article.

A case which arises under a law of the United States must, we are likewise told, be a right given by some act which becomes necessary to execute the powers given in the constitution, of which the law of naturalization is mentioned as an example.

The use intended to be made of this exposition of the first part of the section, defining the extent of the judicial power, is not clearly understood. If the intention be merely to distinguish cases arising under the constitution, from those arising under a law, for the sake of precision in the application of this argument, these propositions will not be controverted. If it be to maintain that a case arising under the constitution, or a law, must be one in which a party comes into Court to demand something conferred on him by the constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the constitution in the 25th section of the judiciary act, and we perceive no reason to depart from that construction.

The jurisdiction of the Court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw

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any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.

The counsel for the defendant in error have undertaken to do this ; and have laid down the general proposition, that a sovereign independent State is not suable, except by its own consent.

This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a State has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the State has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides.

The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole ; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with the portions of that sovereignty which belongs to independent States. Under the influence of this opinion, and thus instructed by experience,

the American people, in the conventions of their respective States, adopted the present constitution.

If it could be doubted, whether from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land ; and the judges in every State shall be bound thereby , any thing in the constitution or laws of any State to the contrary notwithstanding."

This is the authoritative language of the American people , and, if gentlemen please, of the American States. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union, and those of the States. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution , and if there be any who deny its necessity, none can deny its authority.

To this supreme government ample powers are confided , and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared, that they are given " in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

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With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the States, but in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State, in relation to each other, the nature of our constitution, the subordination of the State governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department; are we at liberty to insert in this general grant, an exception of those cases in which a State may be a

party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case.

Had any doubt existed with respect to the just construction of this part of the section, that doubt would have been removed by the enumeration of those cases to which the jurisdiction of the federal Courts is extended, in consequence of the character of the parties. In that enumeration, we find "controversies between two or more States, between a State and citizens of another State," "and between a State and foreign States, citizens, or subjects."

One of the express objects, then, for which the judicial department was established, is the decision of controversies between States, and between a State and individuals. The mere circumstance, that a State is a party, gives jurisdiction to the Court. How, then, can it be contended, that the very same instrument, in the very same section, should be so construed, as that this same circumstance should withdraw a case from the jurisdiction of the Court, where the constitution or laws of the United States are supposed to have been violated? The constitution gave to every person having a claim upon a State, a right to submit his case to the Court of the nation. However unimportant his claim might be, however little the community might be interested in its decision, the framers of our constitution thought it necessary for the purposes of justice, to provide a

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tribunal as superior to influence as possible, in which that claim might be decided. Can it be imagined, that the same persons considered a case involving the constitution of our country and the majesty of the laws, questions in which every American citizen must be deeply interested, as withdrawn from this tribunal, because a State is a party ?

While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is, that the judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.

If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument, proving the necessity of the department, proves also the propriety of giving this extent to it. We do not mean to say, that the jurisdiction of the Courts of the Union should be construed to be co-extensive with the legislative, merely because it is fit that it should be so ; but we mean to say, that this fitness furnishes an argument

in construing the constitution which ought never to be overlooked, and which is most especially entitled to consideration, when we are inquiring, whether the words of the instrument which purport to establish this principle, shall be contracted for the purpose of destroying it.

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The mischievous consequences of the construction contended for on the part of Virginia, are also entitled to great consideration. It would prostrate, it has been said, the government and its laws at the feet of every State in the Union. And would not this be its effect? What power of the government could be executed by its own means, in any State disposed to resist its execution by a course of legislation? The laws must be executed by individuals acting within the several States. If these individuals may be exposed to penalties, and if the Courts of the Union cannot correct the judgments by which these penalties may be enforced, the course of the government may be, at any time, arrested by the will of one of its members. Each member will possess a *veto* on the will of the whole.

The answer which has been given to this argument, does not deny its truth, but insists that confidence is reposed, and may be safely reposed, in the State institutions, and that, if they shall ever become so insane or so wicked as to seek the destruction of the government, they may accomplish their object by refusing to perform the functions assigned to them.

We readily concur with the counsel for the de-

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pendant, in the declaration, that the cases which have been put of direct legislative resistance for the purpose of opposing the acknowledged powers of the government, are extreme cases, and in the hope, that they will never occur; but we cannot help believing, that a general conviction of the total incapacity of the government to protect itself and its laws in such cases, would contribute in no inconsiderable degree to their occurrence.

Let it be admitted, that the cases which have been put are extreme and improbable, yet there are gradations of opposition to the laws, far short of those cases, which might have a baneful influence on the affairs of the nation. Different States may entertain different opinions on the true construction of the constitutional powers of Congress. We know, that at one time, the assumption of the debts contracted by the several States, during the war of our revolution, was deemed unconstitutional by some of them. We knew, too, that at other times, certain taxes, imposed by Congress, have been pronounced unconstitutional. Other laws have been questioned partially, while they were supported by the great majority of the American people. We have no assurance that we shall be less divided than we have been. States may legislate in conformity to their opinions, and may enforce those opinions by penalties. It would be hazarding too much to assert, that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many States the judges are dependent for office and


for salary on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a State shall prosecute an individual who claims the protection of an act of Congress. These prosecutions may take place even without a legislative act. A person making a seizure under an act of Congress, may be indicted as a trespasser, if force has been employed, and of this a jury may judge. How extensive may be the mischief if the first decisions in such cases should be final!

These collisions may take place in times of no extraordinary commotion. But a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization, as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its

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own Courts, rather than on others. There is certainly nothing in the circumstances under which our constitution was formed, nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union. The requisitions of Congress, under the confederation, were as constitutionally obligatory as the laws enacted by the present Congress. That they were habitually disregarded, is a fact of universal notoriety. With the knowledge of this fact, and under its full pressure, a convention was assembled to change the system. Is it so improbable that they should confer on the judicial department the power of construing the constitution and laws of the Union in every case, in the last resort, and of preserving them from all violation from every quarter, so far as judicial decisions can preserve them, that this improbability should essentially affect the construction of the new system? We are told, and we are truly told, that the great change which is to give efficacy to the present system, is its ability to act on individuals directly, instead of acting through the instrumentality of State governments. But, ought not this ability, in reason and sound policy, to be applied directly to the protection of individuals employed in the execution of the laws, as well as to their coercion. Your laws reach the individual without the aid of any other power, why may they not protect him from punishment for performing his duty in executing them?

The counsel for Virginia endeavour to obviate the force of these arguments by saying, that the dangers they suggest, if not imaginary, are inevitable, that the constitution can make no provision against them, and that, therefore, in construing that instrument, they ought to be excluded from our consideration. This state of things, they say, cannot arise until there shall be a disposition so hostile to the present political system as to produce a determination to destroy it, and, when that determination shall be produced, its effects will not be restrained by parchment stipulations. The fate of the constitution will not then depend on judicial decisions. But, should no appeal be made to force, the States can put an end to the government by refusing to act. They have only not to elect Senators, and it expires without a struggle.

It is very true that, whenever hostility to the existing system shall become universal, it will be also irresistible. The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake, resides only in the whole body of the people, not in any sub-division of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.

The acknowledged inability of the government, then, to sustain itself against the public will, and, by force or otherwise, to control the whole nation, is no sound argument in support of its constitutional

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inability to preserve itself against a section of the nation acting in opposition to the general will.

It is true, that if all the States, or a majority of them, refuse to elect Senators, the legislative powers of the Union will be suspended. But if any one State shall refuse to elect them, the Senate will not, on that account, be the less capable of performing all its functions. The argument founded on this fact would seem rather to prove the subordination of the parts to the whole, than the complete independence of any one of them. The framers of the constitution were, indeed, unable to make any provisions which should protect that instrument against a general combination of the States, or of the people, for its destruction, and, conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one State, whose tendency might be to arrest the execution of the laws, and this it was the part of true wisdom to attempt. We think they have attempted it.

It has been also urged, as an additional objection to the jurisdiction of the Court, that cases between a State and one of its own citizens, do not come within the general scope of the constitution; and were obviously never intended to be made cognizable in the federal Courts. The State tribunals might be suspected of partiality in cases between itself or its citizens and aliens, or the citizens of another State but not in proceedings by a State against its own citizens. That jealousy which might exist in the first case, could not exist in the last, and therefore the judicial power is not extended to the last.

This is very true, so far as jurisdiction depends on the character of the parties, and the argument would have great force if urged to prove that this Court could not establish the demand of a citizen upon his State, but is not entitled to the same force when urged to prove that this Court cannot inquire whether the constitution or laws of the United States protect a citizen from a prosecution instituted against him by a State. If jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into Court, that part of the 2d section of the 3d article, which extends the judicial power to all cases arising under the constitution and laws of the United States, would be mere surplusage. It is to give jurisdiction where the character of the parties would not give it, that this very important part of the clause was inserted. It may be true, that the partiality of the State tribunals, in ordinary controversies between a State and its citizens, was not apprehended, and therefore the judicial power of the Union was not extended to such cases, but this was not the sole nor the greatest object for which this department was created. A more important, a much more interesting object, was the preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority, and therefore the jurisdiction of the Courts of the Union was expressly extended to all cases arising under that constitution and those laws. If the constitution or laws may be violated by pro-

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ceedings instituted by a State against its own citizens, and if that violation may be such as essentially to affect the constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to *all* cases arising under the constitution and laws ?

After bestowing on this subject the most attentive consideration, the Court can perceive no reason founded on the character of the parties for introducing an exception which the constitution has not made, and we think that the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties.

The jurisdiction of this Court in all cases arising under the constitution, laws, and treaties of the Union, where a State is a party, may be exercised in an appellate form.

It has been also contended, that this jurisdiction, if given, is original, and cannot be exercised in the appellate form.

The words of the constitution are, "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction."

This distinction between original and appellate jurisdiction, excludes, we are told, in all cases, the exercise of the one where the other is given.


The constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate

form, are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a State be a party, the jurisdiction of this Court is original, if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a State is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the Court? Certainly, we think, so to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavour so to construe them as to preserve the true intent and meaning of the instrument.

In one description of cases, the jurisdiction of the Court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the constitution. The character of the parties is every thing, the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution. In these, the nature of the case is every thing, the character of the parties nothing. When, then, the constitution declares the jurisdiction, in cases where a State shall be a party, to be original, and in all cases arising under the constitution or a law, to be appellate—the conclusion seems irresistible, that its framers designed to include in the first class

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those cases in which jurisdiction is given, because a State is a party, and to include in the second, those in which jurisdiction is given, because the case arises under the constitution or a law.

This reasonable construction is rendered necessary by other considerations.

That the constitution or a law of the United States, is involved in a case, and makes a part of it, may appear in the progress of a cause, in which the Courts of the Union, but for that circumstance, would have no jurisdiction, and which of consequence could not originate in the Supreme Court. In such a case, the jurisdiction can be exercised only in its appellate form. To deny its exercise in this form is to deny its existence, and would be to construe a clause, dividing the power of the Supreme Court, in such manner, as in a considerable degree to defeat the power itself. All must perceive, that this construction can be justified only where it is absolutely necessary. We do not think the article under consideration presents that necessity.

It is observable, that in this distributive clause, no negative words are introduced. This observation is not made for the purpose of contending, that the legislature may "apportion the judicial power between the Supreme and inferior Courts according to its will." That would be, as was said by this Court in the case of *Marbury v. Madison*, to render the distributive clause "mere surplusage," to make it "form without substance." This cannot, therefore, be the true construction of the article.


But although the absence of negative words will not authorize the legislature to disregard the distribution of the power previously granted, their absence will justify a sound construction of the whole article, so as to give every part its intended effect. It is admitted, that "affirmative words are often, in their operation, negative of other objects than those affirmed;" and that where "a negative or exclusive sense must be given to them, or they have no operation at all," they must receive that negative or exclusive sense. But where they have full operation without it, where it would destroy some of the most important objects for which the power was created; then, we think, affirmative words ought not to be construed negatively.

The constitution declares, that in cases where a State is a party, the Supreme Court shall have original jurisdiction, but does not say that its appellate jurisdiction shall not be exercised in cases where, from their nature, appellate jurisdiction is given, whether a State be or be not a party. It may be conceded, that where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there; but where, from its nature, it cannot originate in that Court, these words ought not to be so construed as to require it. There are many cases in which it would be found extremely difficult, and subversive of the spirit of the constitution, to maintain the construction, that appellate jurisdiction cannot be exercised where one of the parties might sue or be sued in this Court.

The constitution defines the jurisdiction of the

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Supreme Court, but does not define that of the inferior Courts. Can it be affirmed, that a State might not sue the citizen of another State in a Circuit Court? Should the Circuit Court decide for or against its jurisdiction, should it dismiss the suit, or give judgment against the State; might not its decision be revised in the Supreme Court? The argument is, that it could not, and the very clause which is urged to prove, that the Circuit Court could give no judgment in the case, is also urged to prove, that its judgment is irreversible. A supervising Court, whose peculiar province it is to correct the errors of an inferior Court, has no power to correct a judgment given without jurisdiction, because, in the same case, that supervising Court has original jurisdiction. Had negative words been employed, it would be difficult to give them this construction if they would admit of any other. But, without negative words, this irrational construction can never be maintained.

So, too, in the same clause, the jurisdiction of the Court is declared to be original, "in cases affecting ambassadors, other public ministers, and consuls." There is, perhaps, no part of the article under consideration so much required by national policy as this; unless it be that part which extends the judicial power. "to all cases arising under the constitution, laws, and treaties of the United States." It has been generally held, that the State Courts have a concurrent jurisdiction with the federal Courts, in cases to which the judicial power is extended, unless the jurisdiction of the federal Courts be rendered exclu-

sive by the words of the third article. If the words, "to all cases," give exclusive jurisdiction in cases affecting foreign ministers, they may also give exclusive jurisdiction, if such be the will of Congress, in cases arising under the constitution, laws, and treaties of the United States. Now, suppose an individual were to sue a foreign minister in a State Court, and that Court were to maintain its jurisdiction, and render judgment against the minister, could it be contended, that this Court would be incapable of revising such judgment, because the constitution had given it original jurisdiction in the case? If this could be maintained, then a clause inserted for the purpose of excluding the jurisdiction of all other Courts than this, in a particular case, would have the effect of excluding the jurisdiction of this Court in that very case, if the suit were to be brought in another Court, and that Court were to assert jurisdiction. This tribunal, according to the argument which has been urged, could neither revise the judgment of such other Court, nor suspend its proceedings for a writ of prohibition, or any other similar writ, is in the nature of appellate process.

Foreign consuls frequently assert, in our Prize Courts, the claims of their fellow subjects. These suits are maintained by them as consuls. The appellate power of this Court has been frequently exercised in such cases, and has never been questioned. It would be extremely mischievous to withhold its exercise. Yet the consul is a party on the record. The truth is, that where the words confer only appellate jurisdiction, original jurisdiction is most

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clearly not given ; but where the words admit of appellate jurisdiction, the power to take cognizance of the suit originally, does not necessarily negative the power to decide upon it on an appeal, if it may originate in a different Court.

It is, we think, apparent, that to give this distributive clause the interpretation contended for, to give to its affirmative words a negative operation, in every possible case, would, in some instances, defeat the obvious intention of the article. Such an interpretation would not consist with those rules which, from time immemorial, have guided Courts, in their construction of instruments brought under their consideration. It must, therefore, be discarded. Every part of the article must be taken into view, and that construction adopted which will consist with its words, and promote its general intention. The Court may imply a negative from affirmative words, where the implication promotes, not where it defeats the intention.

If we apply this principle, the correctness of which we believe will not be controverted, to the distributive clause under consideration, the result, we think, would be this : the original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal Courts ; not to those cases in which an original suit might not be

instituted in a federal Court. Of the last description, is every case between a State and its citizens, and, perhaps, every case in which a State is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction. In every other case, that is, in every case to which the judicial power extends, and in which original jurisdiction is not expressly given, that judicial power shall be exercised in the appellate, and only in the appellate form. The original jurisdiction of this Court cannot be enlarged, but its appellate jurisdiction may be exercised in every case cognizable under the third article of the constitution, in the federal Courts, in which original jurisdiction cannot be exercised, and the extent of this judicial power is to be measured, not by giving the affirmative words of the distributive clause a negative operation in every possible case, but by giving their true meaning to the words which define its extent.

The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the Court, in the case of *Marbury v. Madison*.

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are con-

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sidered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.


In the case of *Marbury v. Madison*, the single question before the Court, so far as that case can be applied to this, was, whether the legislature could give this Court original jurisdiction in a case in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The Court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But, in the reasoning of the Court in support of this decision, some expressions are used which go far beyond it. The counsel for Marbury had insisted on the unlimited discretion of the legislature in the apportionment of the judicial power, and it is against this argument that the reasoning of the Court is directed. They say that, if such had been the intention of the article, "it would certainly have been useless to proceed farther than to define the judicial power, and the tribunals in which it should be vested." The Court says, that such a construction would render the clause, dividing the jurisdiction of the Court into original and appellate, totally useless, that "affirmative words are often, in their operation, negative of other objects than those which are affirmed, and, in this case, (in the case of *Marbury v. Madison*,) a negative or exclusive sense must be given to them, or they have no operation at all." "It cannot be presumed," adds the Court, "that any clause in the constitution is intended to be without

effect, and, therefore, such a construction is inadmissible, unless the words require it."

The whole reasoning of the Court proceeds upon the idea that the affirmative words of the clause giving one sort of jurisdiction, must imply a negative of any other sort of jurisdiction, because otherwise the words would be totally inoperative, and this reasoning is advanced in a case to which it was strictly applicable. If in that case original jurisdiction could have been exercised, the clause under consideration would have been entirely useless. Having such cases only in its view, the Court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle. The reasoning sustains the negative operation of the words in that case, because otherwise the clause would have no meaning whatever, and because such operation was necessary to give effect to the intention of the article. The effort now made is, to apply the conclusion to which the Court was conducted by that reasoning in the particular case, to one in which the words have their full operation when understood affirmatively, and in which the negative, or exclusive sense, is to be so used as to defeat some of the great objects of the article.

To this construction the Court cannot give its assent. The general expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion, limita-

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tions which in no degree affect the decision in that case, or the tenor of its reasoning.

The counsel who closed the argument, put several cases for the purpose of illustration, which he supposed to arise under the constitution, and yet to be, apparently, without the jurisdiction of the Court.

Were a State to lay a duty on exports, to collect the money and place it in her treasury, could the citizen who paid it, he asks, maintain a suit in this Court against such State, to recover back the money ?

Perhaps not. Without, however, deciding such supposed case, we may say, that it is entirely unlike that under consideration.

The citizen who has paid his money to his State, under a law that is void, is in the same situation with every other person who has paid money by mistake. The law raises an assumpsit to return the money, and it is upon that assumpsit that the action is to be maintained. To refuse to comply with this assumpsit may be no more a violation of the constitution, than to refuse to comply with any other, and as the federal Courts never had jurisdiction over contracts between a State and its citizens, they may have none over this. But let us so vary the supposed case, as to give it a real resemblance to that under consideration. Suppose a citizen to refuse to pay this export duty, and a suit to be instituted for the purpose of compelling him to pay it. He pleads the constitution of the United States in bar of the action, notwithstanding which the Court gives judgment against him. This would be a case arising under

the constitution, and would be the very case now before the Court.

We are also asked, if a State should confiscate property secured by a treaty, whether the individual could maintain an action for that property ?

If the property confiscated be debts, our own experience informs us that the remedy of the creditor against his debtor remains. If it be land, which is secured by a treaty, and afterwards confiscated by a State, the argument does not assume that this title, thus secured, could be extinguished by an act of confiscation. The injured party, therefore, has his remedy against the occupant of the land for that which the treaty secures to him, not against the State for money which is not secured to him.

The case of a State which pays off its own debts with paper money, no more resembles this than do those to which we have already adverted. The Courts have no jurisdiction over the contract. They cannot enforce it, nor judge of its violation. Let it be that the act discharging the debt is a mere nullity and that it is still due. Yet the federal Courts have no cognizance of the case. But suppose a State to institute proceedings against an individual, which depended on the validity of an act emitting bills of credit suppose a State to prosecute one of its citizens for refusing paper money, who should plead the constitution in bar of such prosecution. If his plea should be overruled, and judgment rendered against him, his case would resemble this ; and, unless the jurisdiction of this Court might be exercised over it, the constitution would

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be violated, and the injured party be unable to bring his case before that tribunal to which the people of the United States have assigned all such cases.

It is most true that this Court will not take jurisdiction if it should not. but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in *all* cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

To escape the operation of these comprehensive words, the counsel for the defendant has mentioned instances in which the constitution might be violated without giving jurisdiction to this Court. These words, therefore, however universal in their expression, must, he contends, be limited and controlled in their construction by circumstances. One of these instances is, the grant by a State of a patent of nobility. The Court, he says, cannot annul this grant.

This may be very true, but by no means justifies the inference drawn from it. The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity," in which a right, under such law, is asserted in a Court of justice. If the question cannot be brought into a Court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a Court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of the constitution, of which the Courts can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import ought to be given to this article. They do not show that there can be "a case in law or equity," arising under the constitution, to which the judicial power does not extend.

We think, then, that, as the constitution originally stood, the appellate jurisdiction of this Court, in all cases arising under the constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party.

This leads to a consideration of the 11th amendment.

It is in these words: "The judicial power of the United States shall not be construed to extend to any

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suit in law or equity commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State."

It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument. Suits were instituted; and the Court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the Court still extends to these cases and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the Court in those

cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.

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The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a State is made by an individual in the Courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it, but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its Courts, the constitution and laws from active violation.

The words of the amendment appear to the Court to justify and require this construction. The judicial power is not "to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, &c."

What is a suit? We understand it to be the prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a Court of justice. The remedy for every species of wrong is, says Judge Blackstone, "the being put in possession of that right whereof the party injured is deprived." "The instruments whereby this remedy is obtained, are a diversity of suits and actions, which are defined by the

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Mirror to be 'the lawful demand of one's right.' Or, as Bracton and Fleta express it, in the words of Justinian, '*jus prosequendi in judicio quod alicui debetur.*' Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.

To commence a suit, is to demand something by the institution of process in a Court of justice, and to prosecute the suit, is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a Court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same. Suits had been commenced in the Supreme Court against some of the States before this amendment was introduced into Congress, and others might be commenced before it should be adopted by the State legislatures, and might be depending at the time of its adoption. The object of the amendment was not only to prevent the commencement of future suits, but to arrest the prosecution of those which might be commenced when this article should form a part of the constitution. It therefore embraces both objects; and its meaning is, that the judicial power shall not be construed to extend to any suit which may be commenced, or which, if already commenced, may be

prosecuted against a State by the citizen of another State. If a suit, brought in one Court, and carried by legal process to a supervising Court, be a continuation of the same suit, then this suit is not commenced nor prosecuted against a State. It is clearly in its commencement the suit of a State against an individual, which suit is transferred to this Court, not for the purpose of asserting any claim against the State, but for the purpose of asserting a constitutional defence against a claim made by a State.

A writ of error is defined to be, a commission by which the judges of one Court are authorized to examine a record upon which a judgment was given in another Court, and, on such examination, to affirm or reverse the same according to law. If, says my Lord Coke, by the writ of error, the plaintiff may recover, or be restored to any thing, it may be released by the name of an action. In *Bacon's Abridgment*, *tit. Error*, L. it is laid down, that "where by a writ of error, the plaintiff shall recover, or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea, and when land is to be recovered or restored in a writ of error, a release of actions real is a good bar, but where by a writ of error the plaintiff shall not be restored to any personal or real thing, a release of all actions, real or personal, is no bar." And for this we have the authority of Lord Coke, both in his *Commentary on Littleton* and in his *Reports*. A writ of error, then, is in the nature of a suit or action when it is to restore the party who obtains it to the possession of any thing which is with-

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held from him, not when its operation is entirely defensive.

This rule will apply to writs of error from the Courts of the United States, as well as to those writs in England.


Under the judiciary act, the effect of a writ of error is simply to bring the record into Court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties, it acts only on the record. It removes the record into the supervising tribunal. Where, then, a State obtains a judgment against an individual, and the Court, rendering such judgment, overrules a defence set up under the constitution or laws of the United States, the transfer of this record into the Supreme Court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far re-examined. Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of any thing. Essentially, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him, is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given rather than an appeal, because it is the more usual mode of removing suits at common law; and because, perhaps, it is more technically proper where a single point of law, and not the whole case, is to

be re-examined. But an appeal might be given, and might be so regulated as to effect every purpose of a writ of error. The mode of removal is form, and not substance. Whether it be by writ of error or appeal, no claim is asserted, no demand is made by the original defendant, he only asserts the constitutional right to have his defence examined by that tribunal whose province it is to construe the constitution and laws of the Union.

The only part of the proceeding which is in any manner personal, is the citation. And what is the citation? It is simply notice to the opposite party that the record is transferred into another Court, where he may appear, or decline to appear, as his judgment or inclination may determine. As the party who has obtained a judgment is out of Court, and may, therefore, not know that his cause is removed; common justice requires that notice of the fact should be given him. But this notice is not a suit, nor has it the effect of process. If the party does not choose to appear, he cannot be brought into Court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his non-appearance, but the judgment is to be re-examined, and reversed or affirmed, in like manner as if the party had appeared and argued his cause.

The point of view in which this writ of error, with its citation, has been considered uniformly in the Courts of the Union, has been well illustrated by a reference to the course of this Court in suits instituted by the United States. The universally received opinion is, that no suit can be commenced

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or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favour of the United States into a superior Court, where they have, like those in favour of an individual, been re-examined, and affirmed or reversed. It has never been suggested, that such writ of error was a suit against the United States, and, therefore, not within the jurisdiction of the appellate Court.

It is, then, the opinion of the Court, that the defendant who removes a judgment rendered against him by a State Court into this Court, for the purpose of re-examining the question, whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the State, whatever may be its opinion where the effect of the writ may be to restore the party to the possession of a thing which he demands.

But should we in this be mistaken, the error does not affect the case now before the Court. If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted "by a citizen of another State, or by a citizen or subject of any foreign State." It is not then within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.

2d. The second objection to the jurisdiction of the Court is, that its appellate power cannot be exercised, in any case, over the judgment of a State Court.

This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a State from that of the Union, and their entire independence of each other. The argument considers the federal judiciary as completely foreign to that of a State, and as being no more connected with it in any respect whatever, than the Court of a foreign State. If this hypothesis be just, the argument founded on it is equally so, but if the hypothesis be not supported by the constitution, the argument fails with it.

This hypothesis is not founded on any words in the constitution, which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it, and on the incompatibility of the application of the appellate jurisdiction to the judgments of State Courts, with that constitutional relation which subsists between the government of the Union and the governments of those States which compose it.

Let this unreasonableness, this total incompatibility, be examined.

That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In

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The jurisdiction of this Court in all cases arising under the constitution, laws, and treaties of the Union, where the suit is originally brought in a State Court, may be exercised by a writ of error from this Court, to such State Court.

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many other respects, the American people are one , and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation , and for all these purposes, her government is complete ; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.

In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature ? That department can decide on the validity of the constitution or law of a State, if it be repugnant to the constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a State tribunal enforcing such unconstitutional law ? Is it so very unreasonable as to furnish a justification for controlling the words of the constitution ?

We think it is not. We think that in a government

acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the State tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

The propriety of entrusting the construction of the constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn into question. It seems to be a corollary from this political axiom, that the federal Courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them, by the State tribunals. If the federal and State Courts have concurrent jurisdiction in all cases arising under the constitution, laws, and treaties of the United States, and if a case of this description brought in a State Court cannot be removed before judgment, nor revised after judgment, then the construction of the constitution, laws, and treaties of the United States, is not confided particularly to their judicial department, but is confided equally to that department and to the State Courts, however they may be constituted. "Thirteen independent Courts," says a very celebrated statesman, (and we have now more than twenty such Courts,) "of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from

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which nothing but contradiction and confusion can proceed.”

Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a State or its Courts, the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved.

We are not restrained, then, by the political relations between the general and State governments, from construing the words of the constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import.

They give to the Supreme Court appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever Court they may be decided. In expounding them, we may be permitted to take into view those considerations to which Courts have always allowed great weight in the exposition of laws.

The framers of the constitution would naturally examine the state of things existing at the time, and their work sufficiently attests that they did so. All acknowledge that they were convened for the purpose of strengthening the confederation by enlarging the powers of the government, and by giving efficacy

to those which it before possessed, but could not exercise. They inform us themselves, in the instrument they presented to the American public, that one of its objects was to form a more perfect union. Under such circumstances, we certainly should not expect to find, in that instrument, a diminution of the powers of the actual government.

Previous to the adoption of the confederation, Congress established Courts which received appeals in prize causes decided in the Courts of the respective States. This power of the government, to establish tribunals for these appeals, was thought consistent with, and was founded on, its political relations with the States. These Courts did exercise appellate jurisdiction over those cases decided in the State Courts, to which the judicial power of the federal government extended.

The confederation gave to Congress the power "of establishing Courts for receiving and determining finally appeals in all cases of captures."

This power was uniformly construed to authorize those Courts to receive appeals from the sentences of State Courts, and to affirm or reverse them. State tribunals are not mentioned, but this clause in the confederation necessarily comprises them. Yet the relation between the general and State governments was much weaker, much more lax, under the confederation than under the present constitution; and the States being much more completely sovereign, their institutions were much more independent.

The Convention which framed the constitution, on
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turning their attention to the judicial power, found it limited to a few objects, but exercised, with respect to some of those objects, in its appellate form, over the judgments of the State Courts. They extend it, among other objects, to all cases arising under the constitution, laws, and treaties of the United States, and in a subsequent clause declare, that in such cases, the Supreme Court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a State Court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction.

Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is believed, has arisen to which this principle applies more unequivocally than to that now under consideration.

The opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank, and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed. These essays having been published while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of State sovereignty, are entitled to the more consideration where they

frankly avow that the power objected to is given, and defend it.

In discussing the extent of the judicial power, the *Federalist* says, "Here another question occurs: what relation would subsist between the national and State Courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter, to the Supreme Court of the United States. The constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal Courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the State tribunals. Either this must be the case, or the local Courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judicial authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved, the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and State systems are to be regarded as ONE WHOLE. The Courts of the latter will of course be natural auxiliaries to the execu-

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tion of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of natural justice, and the rules of national decision. The evident aim of the plan of the national convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the Courts of the Union. To confine, therefore, the general expressions which give appellate jurisdiction to the Supreme Court, to appeals from the subordinate federal Courts, instead of allowing their extension to the State Courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation."

A contemporaneous exposition of the constitution, certainly of not less authority than that which has been just cited, is the judiciary act itself. We know that in the Congress which passed that act were many eminent members of the Convention which formed the constitution. Not a single individual, so far as is known, supposed that part of the act which gives the Supreme Court appellate jurisdiction over the judgments of the State Courts in the cases therein specified, to be unauthorized by the constitution.

While on this part of the argument, it may be also material to observe that the uniform decisions of this Court on the point now under consideration, have been assented to, with a single exception, by the Courts of every State in the Union whose judgments have been revised. It has been the unwel-

come duty of this tribunal to reverse the judgments of many State Courts in cases in which the strongest State feelings were engaged. Judges, whose talents and character would grace any bench, to whom a disposition to submit to jurisdiction that is usurped, or to surrender their legitimate powers, will certainly not be imputed, have yielded without hesitation to the authority by which their judgments were reversed, while they, perhaps, disapproved the judgment of reversal.

This concurrence of statesmen, of legislators, and of judges, in the same construction of the constitution, may justly inspire some confidence in that construction.

In opposition to it, the counsel who made this point has presented in a great variety of forms, the idea already noticed, that the federal and State Courts must, of necessity, and from the nature of the constitution, be in all things totally distinct and independent of each other. If this Court can correct the errors of the Courts of Virginia, he says it makes them Courts of the United States, or becomes itself a part of the judiciary of Virginia.

But, it has been already shown that neither of these consequences necessarily follows. The American people may certainly give to a national tribunal a supervising power over those judgments of the State Courts, which may conflict with the constitution, laws, or treaties, of the United States, without converting them into federal Courts, or converting the national into a State tribunal. The one Court

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still derives its authority from the State, the other still derives its authority from the nation.

If it shall be established, he says, that this Court has appellate jurisdiction over the State Courts in all cases enumerated in the 3d article of the constitution, a complete consolidation of the States, so far as respects judicial power is produced.

But, certainly, the mind of the gentleman who urged this argument is too accurate not to perceive that he has carried it too far, that the premises by no means justify the conclusion. "A complete consolidation of the States, so far as respects the judicial power," would authorize the legislature to confer on the federal Courts appellate jurisdiction from the State Courts in all cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few specified cases in the decision of which the nation takes an interest, is too obvious not to be perceived by all.

This opinion has been already drawn out to too great a length to admit of entering into a particular consideration of the various forms in which the counsel who made this point has, with much ingenuity, presented his argument to the Court. The argument in all its forms is essentially the same. It is founded, not on the words of the constitution, but on its spirit, a spirit extracted, not from the words of the instrument, but from his view of the nature of our Union, and of the great fundamental principles on which the fabric stands.

To this argument, in all its forms, the same answer may be given. Let the nature and objects of

our Union be considered ; let the great fundamental principles, on which the fabric stands, be examined , and we think the result must be, that there is nothing so extravagantly absurd in giving to the Court of the nation the power of revising the decisions of local tribunals on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction. The question then must depend on the words themselves . and on their construction we shall be the more readily excused for not adding to the observations already made, because the subject was fully discussed and exhausted in the case of *Martin v Hunter*.

3d. We come now to the third objection, which, though differently stated by the counsel, is substantially the same. One gentleman has said that the judiciary act does not give jurisdiction in the case.

The cause was argued in the State Court, on a case agreed by the parties, which states the prosecution under a law for selling lottery tickets, which is set forth, and further states the act of Congress by which the City of Washington was authorized to establish the lottery . It then states that the lottery was regularly established by virtue of the act, and concludes with referring to the Court the questions, whether the act of Congress be valid ? whether, on its just construction, it constitutes a bar to the prosecution ? and, whether the act of Assembly, on which the prosecution is founded, be not itself invalid ? These questions were decided against the operation of the act of Congress, and in favour of the operation of the act of the State.

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The present case within the jurisdiction of the Court, under the judiciary act of 1789, c. 20, s. 25.

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If the 25th section of the judiciary act be inspected, it will at once be perceived that it comprehends expressly the case under consideration.

But it is not upon the letter of the act that the gentleman who stated this point in this form, founds his argument. Both gentlemen concur substantially in their views of this part of the case. They deny that the act of Congress, on which the plaintiff in error relies, is a law of the United States, or, if a law of the United States, is within the second clause of the sixth article.

In the enumeration of the powers of Congress, which is made in the 8th section of the first article, we find that of exercising exclusive legislation over such District as shall become the seat of government. This power, like all others which are specified, is conferred on Congress as the legislature of the Union for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the District, they necessarily preserve the character of the legislature of the Union, for, it is in that character alone that the constitution confers on them this power of exclusive legislation. This proposition need not be enforced.


The 2d clause of the 6th article declares, that "This constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land."

The clause which gives exclusive jurisdiction is, unquestionably, a part of the constitution, and, as such, binds all the United States. Those who contend that acts of Congress, made in pursuance of

this power, do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of Congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on, and exercised by Congress, as the legislature of the Union, is not a law of the United States, and does not bind them.

One of the gentlemen sought to illustrate his proposition that Congress, when legislating for the District, assumed a distinct character, and was reduced to a mere local legislature, whose laws could possess no obligation out of the ten miles square, by a reference to the complex character of this Court. It is, they say, a Court of common law and a Court of equity. Its character, when sitting as a Court of common law, is as distinct from its character when sitting as a Court of equity, as if the powers belonging to those departments were vested in different tribunals. Though united in the same tribunal, they are never confounded with each other.

Without inquiring how far the union of different characters in one Court, may be applicable, in principle, to the union in Congress of the power of exclusive legislation in some places, and of limited legislation in others, it may be observed, that the forms of proceedings in a Court of law are so totally unlike the forms of proceedings in a Court of equity, that a mere inspection of the record gives decisive information of the character in which the Court sits, and consequently of the extent of its powers. But

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if the forms of proceeding were precisely the same, and the Court the same, the distinction would disappear.

Since Congress legislates in the same forms, and in the same character, in virtue of powers of equal obligation, conferred in the same instrument, when exercising its exclusive powers of legislation, as well as when exercising those which are limited, we must inquire whether there be any thing in the nature of this exclusive legislation, which necessarily confines the operation of the laws made in virtue of this power to the place with a view to which they are made.

Connected with the power to legislate within this District, is a similar power in forts, arsenals, dock yards, &c. Congress has a right to punish murder in a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed within any of the States. In the act for the punishment of crimes against the United States, murder committed within a fort, or any other place or district of country, under the sole and exclusive jurisdiction of the United States, is punished with death. Thus Congress legislates in the same act, under its exclusive and its limited powers.

The act proceeds to direct, that the body of the criminal, after execution, may be delivered to a surgeon for dissection, and punishes any person who shall rescue such body during its conveyance from the place of execution to the surgeon to whom it is to be delivered.


Let these actual provisions of the law, or any other provisions which can be made on the subject, be considered with a view to the character in which Congress acts when exercising its powers of exclusive legislation.

If Congress is to be considered merely as a local legislature, invested, as to this object, with powers limited to the fort, or other place, in which the murder may be committed, if its general powers cannot come in aid of these local powers, how can the offence be tried in any other Court than that of the place in which it has been committed? How can the offender be conveyed to, or tried in, any other place? How can he be executed elsewhere? How can his body be conveyed through a country under the jurisdiction of another sovereign, and the individual punished, who, within that jurisdiction, shall rescue the body.

Were any one State of the Union to pass a law for trying a criminal in a Court not created by itself, in a place not within its jurisdiction, and direct the sentence to be executed without its territory, we should all perceive and acknowledge its incompetency to such a course of legislation. If Congress be not equally incompetent, it is because that body unites the powers of local legislation with those which are to operate through the Union, and may use the last in aid of the first, or because the power of exercising exclusive legislation draws after it, as an incident, the power of making that legislation effectual, and the incidental power may be exercised

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throughout the Union, because the principal power is given to that body as the legislature of the Union.

So, in the same act, a person who, having knowledge of the commission of murder, or other felony, on the high seas, or within any fort, arsenal, dock yard, magazine, or other place, or district of country within the sole and exclusive jurisdiction of the United States, shall conceal the same, &c. he shall be adjudged guilty of misprision of felony, and shall be adjudged to be imprisoned, &c.

It is clear, that Congress cannot punish felonies generally, and, of consequence, cannot punish misprision of felony. It is equally clear, that a State legislature, the State of Maryland for example, cannot punish those who, in another State, conceal a felony committed in Maryland. How, then, is it that Congress, legislating exclusively for a fort, punishes those who, out of that fort, conceal a felony committed within it?


The solution, and the only solution of the difficulty, is, that the power vested in Congress, as the legislature of the United States, to legislate exclusively within any place ceded by a State, carries with it, as an incident, the right to make that power effectual. If a felon escape out of the State in which the act has been committed, the government cannot pursue him into another State, and apprehend him there, but must demand him from the executive power of that other State. If Congress were to be considered merely as the local legislature for the fort or other place in which the offence might be committed, then this principle would apply to them as to other local

legislatures, and the felon who should escape out of the fort, or other place, in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the State. But we know that the principle does not apply, and the reason is, that Congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution.

Whether any particular law be designed to operate without the District or not, depends on the words of that law. If it be designed so to operate, then the question, whether the power so exercised be incidental to the power of exclusive legislation, and be warranted by the constitution, requires a consideration of that instrument. In such cases the constitution and the law must be compared and construed. This is the exercise of jurisdiction. It is the only exercise of it which is allowed in such a case. For the act of Congress directs, that "no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties," &c.

The whole merits of this case, then, consist in the construction of the constitution and the act of Con-

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gress. The jurisdiction of the Court, if acknowledged, goes no farther. This we are required to do without the exercise of jurisdiction.

The counsel for the State of Virginia have, in support of this motion, urged many arguments of great weight against the application of the act of Congress to such a case as this ; but those arguments go to the construction of the constitution, or of the law, or of both , and seem, therefore, rather calculated to sustain their cause upon its merits, than to prove a failure of jurisdiction in the Court.

After having bestowed upon this question the most deliberate consideration of which we are capable, the Court is unanimously of opinion, that the objections to its jurisdiction are not sustained, and that the motion ought to be overruled.

Motion denied.

March 22.

The cause was this day argued on the merits.

Mr. *D. B. Ogden*, for the plaintiffs in error, stated, that the question of conflict between the act of Congress and the State law, which arose upon the record, depended upon the 8th section of the first article of the constitution, giving to Congress the exclusive power of legislation, in all cases whatsoever, over the District which had become the seat of the government of the United States, by cession from the States to whom it formerly belonged. Under this power, Congress has authorized the establishment of a lottery at the seat of government. Can

the State of Virginia prevent the sale of tickets in that lottery within her territory, consistently with the constitution? This question must depend upon the nature of the constitutional power of Congress, and of the law by which it is exercised. It was said by the counsel for the defendant in error, on the former argument, that the power is municipal, to be exercised over the District only, and, of course, confined in its operation to the limits of the District. But, in order to determine whether this is the true interpretation of the clause in question, we must more minutely examine what is the nature of the authority granted. The clause was not intended to give to Congress an unlimited power to legislate in all cases, without reference to other provisions of the constitution. Otherwise Congress might pass bills of attainder and *ex post facto* laws, and exercise a despotic authority over the District of Columbia, and its citizens would thus be deprived of their rights entirely. Nor was it intended to authorize the exercise by Congress of its general powers as a national legislature, within the District. Nor to exempt the District from the operation of those general powers. But the clause was inserted for the purpose of securing the independence of the national legislature, and government, from State control. The object in view was, therefore, strictly a national object. The District was created only for national purposes, and every law passed for its government is peculiarly a national law. The words, "*exclusive*

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legislation in all cases whatsoever," were meant to exclude all State legislative power, and to vest in Congress, in addition to its general powers over the whole Union, all possible powers of legislation over the District. The law in question, is the expression of the national will on a national object. It is, then, an act of the general legislative power of the Union, and its operation must be co-extensive with the limits of the Union, unless it is limited to the District of Columbia in express terms, or from the nature of the power itself being incapable of acting without the District. That the whole Union has an interest in the City of Washington, as the national capital, is shown by the cotemporaneous exposition of the constitution by its framers, and by the subsequent acts of the national legislature, providing for its improvement and embellishment. It is admitted, that some of the provisions of the law now in question, are local in their very nature, and, therefore, confined to the City, or the District, in their operation. But the power of the Corporation to establish lotteries, with the consent of the President, is not of this nature. Lottery tickets are an article of commerce, vendible in every part of the Union, as well as in the District of Columbia. A State law which forbids a citizen to sell or buy a ticket in a lottery, legally established by the national legislature, for national purposes, infringes the constitutional rights of the citizen, and tends to impede and defeat the exercise of this national power. He cannot be punished by a State, for selling or buying that which Congress

has, in the exercise of a great national power, authorized to be bought or sold. The authority of establishing this lottery, so far from being confined to the City, could not be conveniently or effectually exercised without extending the saleable quality of the tickets throughout the Union. As a source of revenue, it would be inadequate to the objects for which it was established, without this extension. It is not one of the ordinary sources of revenue for the mere municipal wants of the City. It is a national grant for national purposes, to be used in each particular instance, with the approbation of the President. It is, then, a national law, enacted for a national purpose, and has no other limits in its operation than the limits of the legislative power itself. If Congress had intended to confine its operation within the District of Columbia, they would have expressed that intention. If, then, Congress have a right to raise a revenue, for any national purpose, by establishing a lottery, they had a right to establish this lottery, and no State law can defeat this, any more than the exercise of any other national power. But even supposing that it is not a tax or duty, such as Congress have the *express* power of establishing; yet if it be necessary and proper, in the judgment of the Court, to carry into effect any power expressly granted, such as that of establishing and governing the City, it may be exercised throughout the Union. Congress have the same power to establish lotteries for this purpose, as the State legislatures, and every other legislature, have. The only difference is, that

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with Congress it is the exercise of a national power, and must, therefore, be co-extensive in its operation with the Union, although the money to be raised by it cannot be applied to the use of any other City in the Union than that which is the national capital, and in which, consequently, all the States, and all the people, have a common interest.

Mr. *Webster*, contra, insisted, that Congress had not the power, under the constitution, of establishing a lottery in the District of Columbia, for municipal purposes, and of forcing the sale of the tickets throughout the Union, in contravention of the State laws; and, that even if they had the power, the law now in question did not purport to authorize the Corporation of the City of Washington thus to force the sale of the tickets. It is clear that Congress, as a legislative body, exercise two species of legislative power: the one, limited as to its objects, but extending all over the Union: the other, an absolute, exclusive legislative power over the District of Columbia. The preliminary inquiry in the case now before the Court, is, by virtue of which of these authorities was the law in question passed? When this is ascertained, we shall be able to determine its extent and application. In this country, we are trying the novel experiment of a divided sovereignty, between the national government and the States. The precise line of division between these is not always distinctly marked. Government is a moral not a mathematical science, and the powers of such a government especially, cannot be defined with mathe-

mathematical accuracy and precision. There is a competition of opposite analogies. We arrive at a just conclusion by reasoning from these analogies, and by a general regard to the objects and purposes of this scheme of government. With a view to the present question, it may, perhaps, be safely admitted, that there are certain acts of legislation passed by Congress, with a local reference to this District, which proceed from the general powers with which Congress are invested. They are local in their immediate operation and effect, but they are passed in virtue of general legislative powers. Such are the acts appropriating moneys for constructing the navy yard and the capitol. Some other acts are of a mixed nature. There are others clearly local, and passed in virtue of the local, exclusive jurisdiction. And of this latter class is the act now under consideration. It is for the establishment of a local City government, which arises from the exclusive power of legislation; and the clause authorizing the establishment of lotteries, is combined with other clauses of a mere municipal character *Noscitur a sociis*. Every act of legislation must be limited by its subject matter, and there is nothing to show that this power is to be exercised more extensively than the other powers of the Corporation, nothing to show that this municipal power is to be carried beyond the City. It may be exercised within the City alone, and Congress has not said, and the Court cannot intend, that it is to be exercised in other parts of the Union. Congress could not give such a charter to any other city in the Union, and if every federal

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power granted in the constitution were destroyed, this power would remain. It exists independently, and the legislative powers of the States can never conflict with it, because it can never operate within the States. Being a case of mere local legislation, it is not a *casus fœderis* within that clause of the constitution which declares that the laws of the United States shall be the supreme law of the land. There can be no question of supremacy and subordination where there is no connection or conflict. The constitution makes this provision, because other legislative powers were to operate throughout the Union; the Congress and the States were to legislate over the same subjects, and over the same territory, and therefore there might be conflict. It was because the two codes were to prevail in the same places, and over the same persons. But the provision cannot extend to laws enacted by Congress for the mere local municipal government of the City, because the reason on which it is founded does not extend to a case where all legislation is necessarily exclusive. There was no more reason in this instance to provide for a conflict of the two authorities, than in the case of the laws of a foreign State; which, except in the familiar example of questions relative to the *lex loci contractus*, cannot come in collision with our own laws, because they cannot operate extra-territorially. So here, from the very nature of things, there can arise no conflict between the local laws of the District of Columbia, and those of the States, because each code is confined to its own territory. Any sound interpretation of the law

in question, must limit it to the City of Washington. It does not even extend to the other municipal Corporations within the District of Columbia, because it contains provisions expressly for the government of Washington alone, and does not profess to extend any of them beyond the limits of that City. A law cannot exceed the authority of the lawgiver, and that does not extend beyond the District, and is limited in its actual exercise to the City. There is no authority showing that a grant of power of this kind to a municipal Corporation, extends beyond the local limits of the City.


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The *Attorney-General*, for the plaintiffs in error, in reply, contended, that Congress, in passing the law under consideration, acted in the name of the whole nation, and for a great national object. Congress did not, as contended in the argument on the jurisdiction of the Court, succeed, by the cession, merely to the legislative powers of Maryland and Virginia, over this District. They are not the trustees of those States only, they are the trustees of the whole Union. The cession was to the Congress and government of the United States. The jurisdiction over the territory belongs to the entire people of the United States. It is not the power of Maryland and Virginia which Congress represents, but the power of all the States, and the territory ceded is to be looked at, not with reference to its origin, not as still forming ideally a part of Maryland and Virginia, but is to be regarded as if incorporated into every State in the Union. The question is not, then, to be solved by ask-

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ing what those States could do with respect to this territory, but what each State of the Union could do with regard to its own territory because, to borrow an expression from the municipal law, each State of the Union is seized jointly with all the rest, *per me et per tout*, of the whole jurisdiction over this territory. The acts of the Congress in legislating for the District of Columbia are the acts of all the people of all the States. It is therefore a fallacy in argument to represent Congress as succeeding merely to the same degree of power which Maryland and Virginia formerly had over this territory. Could those States have taxed the other States, or borrowed money on their credit, for the improvement of this territory, as Congress have done? Although the jurisdiction of the States who formerly held the sovereignty and domain of this territory has been supplanted by Congress, the substituted jurisdiction is far more extensive than that which they held. It is a jurisdiction, which in the instances mentioned, and many others which might be enumerated, is capable of affecting all the States. It cannot be denied that the character of the jurisdiction which Congress has over the District, is widely different from that which it has over the States, for, over them, Congress has not exclusive jurisdiction. Its powers over the States are those only which are specifically given, and those which are necessary to carry them into effect whilst over the District it has all the powers which it has over the States, and in addition to these, a power of legislation exclusive of

all the States. But although the jurisdiction over the District is of a different and more extensive character, yet it is not so circumscribed that it may not incidentally affect the States, although exerted for a *local* purpose, as it is called. Such is sometimes the delusive effect of single words and phrases, that the position, that in legislating for the District of Columbia, Congress is a local legislature, for local purposes, and therefore cannot affect the States by its laws, has almost become an aphorism with indolent or prejudiced inquirers. But in what sense can that be called a local government which proceeds from the whole body of the nation? And how can that be termed a local object, which is closely and inseparably connected with the general interest of the whole people of the Union? As well might it be asserted that Congress acted as a local legislature, when it established offices for the sale of lands in the western States, or fortifications at particular points on the sea-coast. It will not be pretended that the first establishment of the seat of government in this District, was an act done by Congress in its character of a local legislature, and for local purposes. How then can the subsequent acts for the improvement and embellishment of the City be so regarded? The act of May 6th, 1796, authorized the commissioners for erecting the public buildings to borrow money for that purpose. Would it have been competent for the legislatures of the States to have impeded this loan by punishing their citizens for subscribing to this stock? And could the States prohibit the sale of the City lots within their territory, and thus ar-

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rest the improvement of the City ? And if they could not, is it not because what Congress in the legitimate exercise of its powers has made it lawful to sell, the States cannot make it unlawful to buy ? Let us test by these considerations the question before the Court and let us distinguish between Congress legislating for the municipal government of the City, and Congress, in its national character providing the means of adding necessary public improvements to the national capital. Congress has itself made this distinction. When a regulation for the mere internal police of the City is to be made, it is done by the Corporation, or some other inferior agent, without the interference of the President of the United States. But, when an alteration of the plan of the City, or a public improvement affecting the whole of the City in a national point of view, is to be made, it is uniformly subjected to the control of the President. So here the specific purpose in view, and for which the lottery was authorized by the President, was, the establishment of a City Hall. a necessary consequence of the establishment of the City, which last was also a necessary consequence of the establishment of the seat of government.

*March 5th.*

The opinion of the Court was delivered by Mr Chief Justice MARSHALL.

This case was stated in the opinion given on the motion for dismissing the writ of error for want of jurisdiction in the Court. It now comes on to be decided on the question whether the Borough Court of Norfolk. in overruling the defence set up under

the act of Congress, has misconstrued that act. It is in these words.

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“The said Corporation shall have full power to authorize the drawing of lotteries for effecting any important improvement in the City, which the ordinary funds or revenue thereof will not accomplish: Provided, that the sum to be raised in each year shall not exceed the amount of 10,000 dollars: And provided, also, that the object for which the money is intended to be raised shall be first submitted to the President of the United States, and shall be approved of by him.”

Two questions arise on this act.

1st. Does it purport to authorize the Corporation to force the sale of these lottery tickets in States where such sales may be prohibited by law? If it does,

2d. Is the law constitutional?

If the first question be answered in the affirmative, it will become necessary to consider the second. If it should be answered in the negative, it will be unnecessary, and consequently improper, to pursue any inquiries, which would then be merely speculative, respecting the power of Congress in the case.

In inquiring into the extent of the power granted to the Corporation of Washington, we must first examine the words of the grant. We find in them no expression which looks beyond the limits of the City. The powers granted are all of them local in their nature, and all of them such as would, in the common course of things, if not necessarily, be exercised

The act of Congress, empowering the Corporation of the City of Washington to authorize the drawing of lotteries, does not purport, and was not intended, to authorize the Corporation to force the sale of the

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tickets in such  
lotteries in  
States where  
such sale is pro-  
hibited by the  
State laws.

within the city. The subject on which Congress was employed when framing this act was a local subject, it was not the establishment of a lottery, but the formation of a separate body for the management of the internal affairs of the City, for its internal government, for its police. Congress must have considered itself as delegating to this corporate body powers for these objects, and for these objects solely. In delegating these powers, therefore, it seems reasonable to suppose that the mind of the legislature was directed to the City alone, to the action of the being they were creating within the City, and not to any extra-territorial operations. In describing the powers of such a being, no words of limitation need be used. They are limited by the subject. But, if it be intended to give its acts a binding efficacy beyond the natural limits of its power, and within the jurisdiction of a distinct power, we should expect to find, in the language of the incorporating act, some words indicating such intention.

Without such words, we cannot suppose that Congress designed to give to the acts of the Corporation any other effect, beyond its limits, than attends every act having the sanction of local law, when any thing depends upon it which is to be transacted elsewhere.

If this would be the reasonable construction of corporate powers generally it is more especially proper in a case where an attempt is made so to exercise those powers as to control and limit the penal laws of a State. This is an operation which was not,

we think, in the contemplation of the legislature, while incorporating the City of Washington.

To interfere with the penal laws of a State, where they are not levelled against the legitimate powers of the Union, but have for their sole object the internal government of the country, is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and the intention would be clearly and unequivocally expressed.

An act, such as that under consideration, ought not, we think, to be so construed as to imply this intention, unless its provisions were such as to render the construction inevitable.

We do not think it essential to the corporate power in question, that it should be exercised out of the City. Could the lottery be drawn in any State of the Union? Does the corporate power to authorize the drawing of a lottery imply a power to authorize its being drawn without the jurisdiction of a Corporation, in a place where it may be prohibited by law? This, we think, would scarcely be asserted. And what clear legal distinction can be taken between a power to draw a lottery in a place where it is prohibited by law, and a power to establish an office for the sale of tickets in a place where it is prohibited by law? It may be urged, that the place where the lottery is drawn is of no importance to the Corporation, and therefore the act need not be so construed as to give power over the place, but that the right to sell tickets throughout the United

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States is of importance, and therefore ought to be implied.

That the power to sell tickets in every part of the United States might facilitate their sale, is not to be denied; but it does not follow that Congress designed, for the purpose of giving this increased facility, to overrule the penal laws of the several States. In the City of Washington, the great metropolis of the nation, visited by individuals, from every part of the Union, tickets may be freely sold to all who are willing to purchase. Can it be affirmed that this is so limited a market, that the incorporating act must be extended beyond its words, and made to conflict with the internal police of the States, unless it be construed to give a more extensive market?

It has been said, that the States cannot make it unlawful to buy that which Congress has made it lawful to sell.

This proposition is not denied, and, therefore, the validity of a law punishing a citizen of Virginia for purchasing a ticket in the City of Washington, might well be drawn into question. Such a law would be a direct attempt to counteract and defeat a measure authorized by the United States. But a law to punish the sale of lottery tickets in Virginia, is of a different character. Before we can impeach its validity, we must inquire whether Congress intended to empower this Corporation to do any act within a State which the laws of that State might prohibit.

In addition to the very important circumstance, that the act contains no words indicating such intention; and that this extensive construction is not essential to the execution of the corporate power, the Court cannot resist the conviction, that the intention ascribed to this act, had it existed, would have been executed by very different means from those which have been employed.

Had Congress intended to establish a lottery for those improvements in the City which are deemed national, the lottery itself would have become the subject of legislative consideration. It would be organized by law, and agents for its execution would be appointed by the President, or in such other manner as the law might direct. If such agents were to act out of the District, there would be, probably, some provision made for such a state of things, and in making such provisions Congress would examine its power to make them. The whole subject would be under the control of the government, or of persons appointed by the government.

But in this case no lottery is established by law, no control is exercised by the government over any which may be established. The lottery emanates from a corporate power. The Corporation may authorize, or not authorize it, and may select the purposes to which the proceeds are to be applied. This Corporation is a being intended for local objects only. All its capacities are limited to the City. This, as well as every other law it is capable of making, is a by-law, and, from its nature, is only co-extensive with the City. It is not probable that

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such an agent would be employed in the execution of a lottery established by Congress, but when it acts, not as the agent for carrying into effect a lottery established by Congress, but in its own corporate capacity, from its own corporate powers, it is reasonable to suppose that its acts were intended to partake of the nature of that capacity and of those powers, and, like all its other acts, be merely local in its nature.

The proceeds of these lotteries are to come in aid of the revenues of the City. These revenues are raised by laws whose operation is entirely local, and for objects which are also local, for no person will suppose, that the President's house, the Capitol, the Navy Yard, or other public institution, was to be benefitted by these lotteries, or was to form a charge on the City revenue. Coming in aid of the City revenue, they are of the same character with it; the mere creature of a corporate power.

The circumstances, that the lottery cannot be drawn without the permission of the President, and that this resource is to be used only for important improvements, have been relied on as giving to this corporate power a more extensive operation than is given to those with which it is associated. We do not think so.

The President has no agency in the lottery. It does not originate with him, nor is the improvement to which its profits are to be applied to be selected by him. Congress has not enlarged the corporate power by restricting its exercise to cases of which the President might approve.

We very readily admit, that the act establishing the seat of government, and the act appointing commissioners to superintend the public buildings, are laws of universal obligation. We admit, too, that the laws of any State to defeat the loan authorized by Congress, would have been void, as would have been any attempt to arrest the progress of the canal, or of any other measure which Congress may adopt. These, and all other laws relative to the District, have the authority which may be claimed by other acts of the national legislature, but their extent is to be determined by those rules of construction which are applicable to all laws. The act incorporating the City of Washington is, unquestionably, of universal obligation, but the extent of the corporate powers conferred by that act, is to be determined by those considerations which belong to the case.

Whether we consider the general character of a law incorporating a City, the objects for which such law is usually made, or the words in which this particular power is conferred, we arrive at the same result. The Corporation was merely empowered to authorize the drawing of lotteries, and the mind of Congress was not directed to any provision for the sale of the tickets beyond the limits of the Corporation. That subject does not seem to have been taken into view. It is the unanimous opinion of the Court, that the law cannot be construed to embrace it.

Judgment affirmed.

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JUDGMENT. This cause came on to be heard on the transcript of the record of the Quarterly Session Court for the Borough of Norfolk, in the Commonwealth of Virginia, and was argued by counsel. On consideration whereof, it is ADJUDGED and ORDERED, that the judgment of the said Quarterly Session Court for the Borough of Norfolk, in this case, be, and the same is hereby affirmed, with costs.

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(PRACTICE.)

### GIBBONS V. OGDEN.

A decree of the highest Court of Equity of a State, affirming the decretal order of an inferior Court of Equity of the same State, refusing to dissolve an injunction granted on the filing of the bill, is not a final decree within the 25th section of the judiciary act of 1789, c. 20. from which an appeal lies to this Court.

APPEAL from the Court for the Trial of Impeachments and the Correction of Errors of the State of New-York.

This was a bill filed by the plaintiff below, (Ogden,) against the defendant below, (Gibbons,) in the Court of Chancery of the State of New-York, for an injunction to restrain the defendant from navigating certain steam boats on the waters of the State of New-York, lying between Elizabethtown, in the State of New-Jersey, and the City of New-York :